Auspicious Journey Sdn Bhd v Ebony Ritz Sdn Bhd & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-53-06 OF 2019(W)

AZAHAR MOHAMED CJ (MALAYA), NALLINI PATHMANATHAN, ABDUL RAHMAN SEBLI, ZALEHA YUSOF AND ZABARIAH MOHD FCJJ

9 MARCH 2021

Companies and Corporations — Members' rights — Petition under Companies Act 1965 ('the CA 1965'), s 181 (now s 346 of the Companies Act 2016) — Whether directors could be held personally liable for oppressive acts carried out by majority shareholder company upon the minority — Whether third parties who collaborated with the directors could also be held liable — Whether language used in s 181 of the CA 1965 (s 346 of the CA 2016) empowered court to order compensatory reliefs against directors and third parties — Whether imposition of liability against directors and third parties should only be made if facts and circumstances warranted it and it was fair and just in all the circumstances — Whether in an oppression petition court was not bound to grant only the reliefs set out in s 181(2) of the CA 1965 (s 346(2) of the CA 2016) but had power to fashion the relief to fit the circumstances

The question in the instant appeal was whether in a petition filed by a minority shareholder under s 181 of the Companies Act 1965 (now s 346 of the Companies Act 2016) for relief against the oppressive, discriminatory or prejudicial manner in which the affairs of the company were run, the directors of the company and third parties who had collaborated with them could be held accountable. In the instant case, the majority shareholder in the subject company was itself a company and the majority directors in the subject company were also directors in the majority shareholder company. Both the courts below held that even in the case of a s 181 CA 1965 (s 346 CA 2016) petition, the general principle applied that a director was an agent of the company and could not be liable for its acts and breaches. The appellant ('AJ') and the second respondent ('HL') — a Singapore-registered entity — had formed a joint-venture company, namely, the first respondent ('ER'), for the purpose of acquiring 49% of the shares of another company ('Sumatec') in the latter's wholly-owned subsidiary ('SI') for RM44.1m so that ER could gain a significant foothold in the oil-tanker chartering business that SI was involved in. AJ was the minority shareholder in ER, holding 20% of the shares, whilst HL was the majority shareholder, holding 80% of the shares. In proportion to their shareholding, AJ contributed 20% and HL 80%, towards payment of the said share acquisition price. Two of the three directors in ER were also directors in HL, namely, the third and fourth respondents ('the Kuah brothers'). The

remaining director was AJ's nominee. On the same day that ER signed the agreement to buy Sumatec's 49% shares in SI, the two parties together with AJ signed another agreement ('OFRA') under which, inter alia, Sumatec unconditionally and irrevocably guaranteed to ER that it would make good any shortfall if SI's audited profit after taxation fell short of the financial representations that Sumatec had made. If Sumatec failed to make good the shortfall, ER was given the call option to require Sumatec to sell not less than 2% of its shares in SI to ER, while AJ was given the call option to require Sumatec to sell not less than 49% of its shares in SI to AJ. SI's business subsequently suffered badly and Sumatec, which was also in financial distress, could not make good the profit shortfall under the OFRA guarantee thereby entitling ER and AJ to exercise their respective call options. However, AJ discovered that without its knowledge HL had entered into a conditional sale and purchase agreement ('conditional SPA') with the fifth respondent ('Setinggi'), ER and Sumatec under which Sumatec's balance 51% shareholding in SI was to be acquired by both HL and Setinggi in the proportions, 2% and 49%, respectively. The conditional SPA did not materialise, but if it had, HL would have acquired total control of Sumatec as Setinggi was its nominee. AJ also discovered that under the conditional SPA, ER had waived or relinquished its rights under the OFRA profit shortfall guarantee as well as its right to exercise the 2% call option. ER had also provided Sumatec an indemnity indemnifying it against all claims while dividends payable to ER had been reassigned. AJ filed the s 181 CA 1965 petition against the respondents contending that HL had exercised its majority powers in ER through the Kuah brothers to cause ER to enter into the conditional SPA solely to benefit HL to the detriment of AJ and ER since, among other things, their entitlements under the OFRA had been compromised. AJ sought a declaration that HL as the majority shareholder in ER and the Kuah brothers as directors had conducted the affairs of ER in a manner oppressive, discriminatory and prejudicial to AJ and in disregard of AJ's interests as a member. In response, HL said the conditional SPA was intended to save the joint venture from breaking apart because AJ had wanted to opt out of the venture when Sumatec and SI ran into financial difficulties. HL contended that it wanted to keep the joint venture alive but AJ refused to invest any further monies in the venture, even for the purpose of exercising its 49% call option. HL contended that the true purpose of AJ's petition was to extricate itself from a bad bargain and recover its investment by having the court order HL to buy over AJ's 20% shareholding in ER. The High Court held that HL, as the majority shareholder, had conducted ER's affairs in a manner oppressive/prejudicial to AJ as the minority shareholder. AJ's claims against the Kuah brothers, Setinggi and the sixth respondent ('Teh') were dismissed. Setinggi had never purchased the shares under the conditional SPA. Teh was Setinggi's sole director and shareholder at all material times. The High Court found the Kuah brothers not liable both on the principle that they were agents of the company, and therefore not personally liable for its acts/breaches, but

also for the reason that the Kuah brothers had at all times acted in the best interests of ER. The court also decided that the winding up of ER was the most appropriate remedy given ER's poor financial state, the fact that the relationship between its shareholders had completely broken down and that the purpose of the joint-venture was no longer achievable. No buy-out of AJ's shares in ER by HL was ordered since, inter alia, that would have resulted in ER breaching the Merchant Shipping Ordinance 1952 ('the MSO') which required any company involved in the oil-tanker industry to be majority-Malaysian in composition. AJ appealed to the Court of Appeal ('COA') against the dismissal of its action against the third, fourth and sixth respondents as well as the decision to wind up ER while HL appealed against the finding that it was liable. The COA upheld the findings of the High Court and dismissed all the appeals. The only issue in this appeal was whether the courts below were right in refusing to hold the Kuah brothers personally liable under the s 181 petition.

Held, unanimously dismissing the appeal and remitting the matter to the High Court to assess the damages payable to the appellant:

(1) The courts below erred in adopting the position that no liability could devolve upon directors as they were agents of the company and the independent corporate legal personality prevailed to preclude liability from devolving directly upon the directors. Whilst this might well be the general position, in the case of oppression, the legislature had provided specific statutory relief and that must necessarily prevail over the general corporate law position in relation to relief from oppression for shareholders. However, on the facts of the instant appeal the courts below were correct in not attaching liability to the Kuah brothers or to Teh (see paras 129–130 & 161–162).

(2) The language of s 181 of the Companies Act 1965 (now s 346 of the Companies Act 2016) was wide enough to encompass compensatory relief against directors and third parties in an appropriate case depending on the facts and circumstances. Pursuant to s 181(2) of the CA 1965 (s 346(2) of the CA 2016) the court was empowered to make such order as it thought fit to bring an end to, or remedy, the matters complained of. The court was not bound by the reliefs sought by the petitioner or restricted to the reliefs mentioned in s 181(2) of the CA 1965 (s 346(2) of the CA 2016) but was at liberty to fashion the remedy in accordance with the factual matrix of the case (see paras 136, 148 & 151).

(3) Both the courts below did not err in concluding that on the facts of the case an order that HL buy out AJ's shares should not be made as that would make ER wholly foreign-owned and it would not be able to carry out the business of oil-tanker chartering because the MSO required any company involved in such business to be a majority-Malaysian company.

The High Court had also reasoned that a buy-out would not yield a fair price as ER was a failed joint-venture and insolvent. The courts below were also right in concluding that the winding up of ER was the most appropriate remedy given the breakdown in the relationship between the shareholders coupled with ER's insolvent state (see paras 152, 154–158 & 163).

(4) In seeking a buy-out of its shareholding in ER, AJ was seeking to escape from a bad bargain or to recoup its investment in the joint-venture with HL. There was always a risk that an investment might not pan out in the way it was intended. Ordering a share buy-out was tantamount to insulating AJ from the risk that its capital was subject to. This was certainly not what s 181 of the CA 1965 (s 346 of the CA 2016) was meant to protect against (see para 153).

(5) The courts below had rightly taken into account the fact that while the acts of salvage and warehousing undertaken by HL and the Kuah brothers and the manner in which they were carried out might in themselves be categorised as prejudicial and detrimental to AJ, the conduct was ultimately related to salvaging ER. AJ refused to expend any further monies in the joint-venture to salvage ER's investment and was not even interested in exercising its call option. This was to be contrasted with the conduct of HL in injecting no less than RM38m into SI to keep it afloat. All these factors had to be taken into account in applying the 'fair and just' test to determine whether the directors should be held personally liable. The preponderance of factors militated against holding the Kuah brothers and Teh personally liable for their oppressive conduct (see paras 141–142).

(6) The following legal test was applicable in assessing whether in any given complaint of oppression, liability had been established against a director and/or a third party (see paras 127–128):

(a) whether there was evidence of the director's or the third party's deliberate involvement or participation in, or a sufficiently close nexus, to the oppressive or detrimental or prejudicial conduct that the minority complained of;

(b) an objective assessment should be made to determine whether in all the circumstances of the case the imposition of liability was fair and just;

(c) the imposition of liability should be circumspect, going no further than was necessary to remedy the breach complained of or to stop the oppressive or prejudicial conduct;

(d) the imposition of liability must be reasonable and serve to alleviate the legitimate concerns of the shareholders of the company in question; and

(e) in exercising its powers under s 181 of the CA 1965 (s 346 of the CA 2016) the court should bear in mind general corporate law principles such that director liability did not become a substitute for other statutory relief or under the common law.

[Bahasa Malaysia summary

Persoalan dalam rayuan semasa adalah sama ada dalam petisyen yang difailkan oleh pemegang saham minoriti di bawah s 181 Akta Syarikat 1965 (sekarang s 346 Akta Syarikat 2016) bagi relif terhadap tindakan penindasan, diskriminasi atau prejudis di mana urusan syarikat dijalankan, pengarah syarikat dan pihak ketiga yang telah bekerjasama dengan mereka seharusnya dipertanggungjawabkan. Dalam kes semasa, pemegang saham majoriti dalam syarikat utama tersebut sendiri adalah syarikat dan pengarah majoriti di syarikat utama juga merupakan pengarah di syarikat pemegang saham majoriti. Kedua-dua mahkamah di bawah ini memutuskan bahawa walaupun dalam kes petisyen s 181 AS 1965 (s 346 AS 2016), prinsip am terpakai bahawa seorang pengarah adalah ejen syarikat dan tidak boleh bertanggungjawab atas tindakan dan pelanggarannya. Perayu ('AJ') dan responden kedua ('HL') — entiti berdaftar di Singapura — telah membentuk syarikat usahasama, iaitu, responden pertama ('ER'), dengan tujuan memperoleh 49% daripada saham syarikat lain ('Sumatec') dalam anak syarikat milik sepenuhnya ('SI') dengan harga RM44.1 juta supaya ER dapat memperoleh pegangan yang besar dalam perniagaan penyewaan kapal tangki minyak di mana SI terlibat. AJ adalah pemegang saham minoriti di ER, memegang 20% saham, sementara HL adalah pemegang saham majoriti, memegang 80% saham. Berdasarkan kepada kadar pegangan saham mereka, AJ menyumbang 20% dan HL 80%, terhadap pembayaran harga perolehan saham tersebut. Dua daripada tiga pengarah di ER juga merupakan pengarah di HL, iaitu responden ketiga dan keempat ('Kuah bersaudara'). Selebihnya pengarah adalah nomini AJ. Pada hari yang sama dengan ER menandatangani perjanjian untuk membeli 49% saham Sumatec dalam SI, kedua-dua pihak bersama AJ menandatangani perjanjian lain ('OFRA') di mana, antara lain, Sumatec memberikan jaminan tanpa syarat dan tanpa batal kepada ER bahawa ia akan memberikan tambahan sebarang kekurangan sekiranya keuntungan selepas cukai yang diaudit oleh SI kurang daripada representasi kewangan yang telah dibuat oleh Sumatec. Sekiranya Sumatec gagal membuat penambahan pada kekurangan tersebut, ER diberi pilihan panggilan untuk meminta Sumatec menjual tidak kurang dari 2% sahamnya dalam SI ke ER, sementara AJ diberi pilihan panggilan untuk meminta Sumatec menjual tidak kurang dari 49% sahamnya dalam SI kepada AJ. Perniagaan SI kemudiannya kerugian teruk dan Sumatec, yang juga dalam masalah kewangan, tidak dapat menambah kekurangan keuntungan di bawah jaminan OFRA dengan itu membolehkan ER dan AJ menggunakan pilihan panggilan masing-masing. Namun, AJ mendapati bahawa tanpa pengetahuannya, HL telah memasuki perjanjian jual beli bersyarat ('SPA bersyarat') dengan responden kelima ('Setinggi'), ER dan Sumatec di mana

baki 51% saham Sumatec dalam SI akan diambil oleh HL dan Setinggi dalam perkadaran, masing-masing 2% dan 49%. SPA bersyarat itu tidak dimuktamadkan, tetapi sekiranya berlaku, HL akan memperoleh kawalan penuh atas Sumatec karena Setinggi adalah nomininya. AJ juga mendapati bahawa di bawah SPA bersyarat, ER telah mengenepikan atau melepaskan haknya di bawah jaminan kekurangan keuntungan OFRA serta haknya untuk menggunakan pilihan panggilan 2%. ER juga telah memberikan ganti rugi kepada Sumatec terhadap kesemua tuntutan sementara dividen yang perlu dibayar kepada ER telah diserahkan semula. AJ mengemukakan petisyen s 181 AS 1965 terhadap responden yang berpendapat bahawa HL telah menggunakan kuasa majoritinya di ER melalui Kuah bersaudara sehingga menyebabkan ER memasuki dalam SPA bersyarat semata-mata untuk menguntungkan HL sehingga merugikan AJ dan ER kerana, antara lain, hak mereka di bawah OFRA telah terjejas. AJ memohon deklarasi bahawa HL sebagai pemegang saham majoriti di ER dan Kuah bersaudara sebagai pengarah telah menjalankan urusan ER dengan cara yang menindas, diskriminasi dan prejudis terhadap AJ dan mengabaikan kepentingan AJ sebagai ahli. Sebagai jawapan, HL mengatakan SPA bersyarat tersebut bertujuan untuk menyelamatkan usaha sama tersebut daripada terbatal kerana AJ ingin menarik diri daripada usaha tersebut apabila Sumatec dan SI menghadapi masalah kewangan. HL berpendapat bahawa ia ingin mengekalkan usaha sama tersebut tetapi AJ enggan melaburkan wang lagi dalam usaha tersebut, walaupun untuk tujuan melaksanakan pilihan panggilannya sebanyak 49%. HL berpendapat bahawa tujuan sebenar petisyen AJ adalah untuk melepaskan diri dari urusan yang tidak baik dan mendapatkan kembali pelaburannya dengan memohon mahkamah memerintahkan HL untuk membeli melebihi 20% pegangan saham AJ di ER. Mahkamah Tinggi memutuskan bahawa HL, sebagai pemegang saham majoriti, telah menjalankan urusan ER dengan cara yang menindas/memprejudsikan AJ sebagai pemegang saham minoriti. Tuntutan AJ terhadap Kuah bersaudara, Setinggi dan responden keenam ('Teh') telah ditolak. Setinggi tidak pernah membeli saham tersebut di bawah SPA bersyarat. Teh adalah pengarah tunggal dan pemegang saham Setinggi sepanjang masa yang material. Mahkamah Tinggi mendapati Kuah bersaudara tidak bertanggungjawab atas prinsip bahawa mereka adalah ejen syarikat, dan oleh itu tidak bertanggungjawab secara peribadi atas tindakan/pelanggarannya, tetapi juga dengan alasan bahawa Kuah bersaudara pada sepanjang masa bertindak demi kepentingan terbaik ER. Mahkamah juga memutuskan bahawa penggulungan ER adalah remedi yang paling tepat memandangkan keadaan kewangan ER yang teruk, hakikat bahawa hubungan antara pemegang sahamnya telah rosak sepenuhnya dan bahawa tujuan usaha sama itu tidak dapat dicapai lagi. Tidak ada pembelian saham AJ dalam ER oleh HL kerana, antara lain, itu akan menyebabkan ER melanggar Ordinan Perkapalan Saudagar 1952 ('OPS') yang mewajibkan mana-mana syarikat yang terlibat dalam industri tangki minyak menjadi majoriti-warga Malaysia dalam komposisinya. AJ merayu ke Mahkamah Rayuan ('MR') terhadap

penolakan tindakannya terhadap responden ketiga, keempat dan keenam serta keputusan untuk menggulung ER sementara HL merayu terhadap dapatan bahawa ianya bertanggungjawab. MR mengesahkan dapatan Mahkamah Tinggi dan menolak kesemua rayuan. Satu-satunya isu dalam rayuan ini adalah sama ada mahkamah di bawah ini benar-benar tepat dalam enggan memutuskan bahawa Kuah bersaudara bertanggungjawab di bawah petisyen 181.

Diputuskan, dengan sebulat suara menolak rayuan dan menyerahkan perkara tersebut ke Mahkamah Tinggi untuk menaksirkan ganti rugi yang harus dibayar kepada perayu:

(1) Pengadilan di bawah telah terkhilaf dalam mengambil keputusan bahawa tidak ada tanggungjawab yang dapat diletakkan kepada pengarah kerana mereka adalah ejen syarikat dan badan korporat dengan keperibadian perundangan bebas terpakai untuk mengelakkan liabiliti daripada terus diletakkan kepada pengarah. Walaupun ini mungkin merupakan kedudukan umum, dalam hal penindasan, badan perundangan telah memberikan relif perundangan yang khusus dan yang semestinya terpakai berbanding kedudukan perundangan am korporat berkaitan dengan relif penindasan bagi pemegang saham. Walau bagaimanapun, berdasarkan fakta-fakta rayuan semasa, Mahkamah di bawah ini betul kerana tidak meletakkan tanggungjawab terhadap Kuah bersaudara atau Teh (lihat perenggan 129–130 & 161–162).

(2) Bahasa s 181 Akta Syarikat 1965 (sekarang s 346 Akta Syarikat 2016) cukup luas untuk merangkumi relif pampasan terhadap pengarah dan pihak ketiga dalam kes yang sesuai bergantung dengan fakta dan keadaan. Berdasarkan s 181(2) AS 1965 (s 346(2) AS 2016) Mahkamah diberi kuasa untuk membuat perintah yang difikirkan sesuai untuk menamatkan, atau memperbaiki, perkara-perkara yang diadukan. Mahkamah tidak terikat dengan relif yang dimohon oleh pempetisyen atau dihalang dengan relif yang dirujuk dalam s 181(2) AS 1965 (s 346(2) AS 2016) tetapi bebas untuk membuat remedi bersesuaian dengan matriks fakta kes tersebut (lihat perenggan 136, 148 & 151).

(3) Kedua-dua mahkamah di bawah ini tidak terkhilaf dalam menyimpulkan bahawa berdasarkan fakta kes, perintah agar HL membeli saham AJ tidak harus dibuat kerana ia akan menjadikan ER dimiliki sepenuhnya oleh warga asing dan tidak akan dapat melaksanakan perniagaan penyewaan kapal tangki minyak kerana OPS menghendaki syarikat yang terlibat dalam perniagaan tersebut adalah syarikat majoriti-Malaysia. Mahkamah Tinggi juga memberi alasan bahawa pembelian tersebut tidak akan menghasilkan harga yang berpatutan kerana ER adalah usaha sama yang gagal dan tidak solven. Mahkamah di bawah ini juga tepat dalam menyimpulkan bahawa

penggulungan ER adalah remedi yang paling tepat memandangkan kerosakan dalam hubungan antara pemegang saham bersama dengan keadaan ER yang tidak solven (lihat perenggan 152, 154–158 & 163).

(4) Dalam mencari pembelian sahamnya di ER, AJ berusaha untuk melepaskan diri dari urusan yang tidak baik atau untuk mendapatkan kembali pelaburannya dalam usaha sama dengan HL. Selalunya terdapat risiko bahawa pelaburan mungkin tidak berjalan sebagaimana yang dikehendaki. Memohon pembelian saham adalah sama dengan melindungi AJ dari risiko yang dikenakan tertakluk pada modalnya. Ini jelas bukan apa yang s 181 AS 1965 (s 346 AS 2016) cuba untuk melindungi (lihat perenggan 153).

(5) Mahkamah di bawah ini dengan tepat mempertimbangkan fakta bahawa sementara tindakan penyelamatan dan penyimpanan yang dilakukan oleh HL dan Kuah bersaudara dan cara pelaksanaannya dapat dengan sendirinya dikategorikan sebagai prejudis dan merugikan AJ,tindakan tersebut akhirnya berkaitan dengan menyelamatkan ER. AJ enggan mengeluarkan sejumlah wang dalam usaha sama untuk menyelamatkan pelaburan ER dan bahkan tidak berminat untuk menggunakan pilihan panggilannya. Ini harus dibandingkan dengan tindakan HL dalam memberikan SI tidak kurang dari RM38 juta ke SI untuk memastikannya terus bertahan. Semua faktor ini harus diambil kira dalam menerapkan ujian 'adil dan saksama' untuk menentukan sama ada pengarah harus bertanggungjawab secara peribadi. Keunggulan faktor-faktor yang bertentangan dengan meletakkan Kuah bersaudara dan Teh secara peribadi bertanggungjawab atas tindakan mereka yang menindas (lihat perenggan 141–142).

(6) Ujian perundangan berikut terpakai untuk menilai sama ada dalam sebarang aduan penindasan, tanggungjawab telah dibuktikan terhadap pengarah dan/atau pihak ketiga (lihat perenggan 127–128):

(a) sama ada terdapat keterangan penglibatan atau penyertaan pengarah atau pihak ketiga secara sengaja, atau hubungan yang cukup dekat, dengan tingkah laku yang menindas atau memudaratkan atau prejudis yang diadukan oleh minoriti;

(b) penilaian objektif harus dibuat untuk menentukan sama ada dalam semua keadaan kes pengenaan tanggungjawab tersebut adalah adil dan saksama;

(c) pengenaan tanggungjawab harus berhati-hati, tidak lebih dari yang perlu untuk memperbaiki pelanggaran yang diadukan atau menghentikan tindakan yang menindas atau prejudis;

(d) pengenaan tanggungjawab mestilah wajar dan berfungsi untuk

mengurangkan masalah yang sah pemegang saham syarikat yang berkenaan; dan

(e) dalam menjalankan kuasanya di bawah s 181 AS 1965 (s 346 AS 2016) mahkamah harus mengingat prinsip undang-undang korporat am sehingga tanggungjawab pengarah tidak menjadi pengganti relif perundangan lain atau di bawah common law.]

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Companies Act 1965 (repealed by Companies Act 2016) ss 168A(2), 176, 181, 181(1), (1)(a), (2), 182(2), 210, 346
Companies Act 1985 [UK] ss 459, 461
Companies Act 2006 [UK] ss 175, 219, 994, 994(1)
Companies Act 2016 ss 346, 346(2)
Merchant Shipping Ordinance 1952 s 11

Appeal from: Civil Appeal No W-02(NCC)(A)-1614–08 of 2016 (Court of Appeal, Putrajaya)

Cyrus Das (Robert Low, Karen Yong and Chong Lip Yi with him) (Ranjit Ooi & Robert Low) for the appellant.
Sazlinidayu bt Kamarul (Roslinda bt Razali with her) (Senior Federal Counsel, Malaysian Department of Insolvency) for the first respondent.
Mathew Thomas Philip (Clinton Tan Kian Seng and Rachel Ng Li Hui with him) (Thomas Philip) for the second, third, fourth and sixth respondents.

Nallini Pathmanathan FCJ:

INTRODUCTION

[1] Albert Camus famously said 'Democracy is not the law of the majority, but the protection of the minority'. Much like sovereign democracy, shareholder democracy is also bound by one of the bulwarks of corporate law — majority rule, which enforces the will of the majority over and above individual shareholder interests. While this rule promotes efficiency, instances of abuse recur. The tyranny of the majority has often overridden the valid grievances of the minority. But company law has intervened through statute to ensure that the behaviour of the majority does not result in oppression or unduly prejudicial results adversely affec ting the interests of the minority. One of these statutory interventions is captured in s 181 of the Companies Act 1965, now s 346 of the Companies Act 2016.

[2] Historically, minority shareholders were relegated to the sole remedy of winding up a company under the just and equitable principle. But this single remedy was found to be both insufficient and drastic, resulting in the intervention of the legislature through the enactment of provisions in our company law statutes of various remedies. Therefore minority shareholders may resort to claims for oppression, discriminatory conduct, prejudice and mismanagement to redress the balance of power where majority rule takes on authoritarian or tyrannical hues.

[3] Section 181 of our then Companies Act 1965 ('the CA 1965') that is now s 346 of the Companies Act 2016 ('the CA 2016') are both identical in form. This statutory provision comprises one of the broadest and most comprehensive statutory shareholder remedies av ailable in the common law world. Section 181 (now s 346) provides for the broad involvement of the courts in fashioning a wide-ranging series of remedies for the beleaguered shareholder/s who are able to establish oppression, prejudice or discriminatory acts or omissions by those in control, generally the majority.

[4] Traditionally the court by way of redress, censures or regulates the majority so as to bring the matters complained of to an end, or provides a remedy to the grievance. Can such remedies be extended so as to devolve

liability onto parties other than the majority (or the minority if they are in control), such as directors or third parties? That is the question and central issue before us in this appeal.

[5] More specifically, t his appeal raises the issue of whether a director or a third party may be made liable in proceedings brought under s 181 of the CA 1965 (now s 346 of the CA 2016) where the directors (and third parties) of the company in issue are found to have acted in a manner detrimental to the minority shareholder.

[6] In the High Court, the judge found liability under s 181 of the CA 1965 was established against the majority shareholder alone, and dismissed the claim against the other defendants, who were directors and third parties. In other words, liability against the directors and third parties under s 181 of the CA 1965 was dismissed. The Court of Appeal upheld the findings of the High Court. The basis for the refusal to extend liability to the directors, in essence, was that a director is an agent of a company and could not therefore be personally liable for the breaches or acts of the company, even in an oppression claim under s 181 of the CA 1965 (and thereby s 346 of the CA 2016). The appellant sought leave to appeal.

[7] Pursuant to leave granted 13 March 2019, the following questions of law arose for consideration before us:

Question 1:

Whether the principle in *Abdul Manaf Mohd bin Ghows & Ors v Nusantara Timur Sdn Bhd & Ors* [1997] 3 MLJ 661 (to the effect that a director is an agent of a company and is thereby not personally liable for the breaches or acts of the company) applies to proceedings under s 181 of the Companies Act 1965 (now s 346 of the Companies Act 2016) where the shareholder is itself a company and the acts of oppression and unfair dealings are derived from the mind and acts of the principal directors?

Question 2:

Whether a director and/or directors of a subject company who are privy to the wrongdoings perpetrated and/or undertaken at the subject company level, and such wrongdoings have been found to be within the ambit of s 181 of the Companies Act 1965 Act (now s 346 of the Companies Act 2016), may be visited with liability pursuant to the said section 181 (now s 346 of the Companies Act 2016)?

A

Question 2.1:

If in the affirmative, the circumstances in which such a director or directors may be visited with liability?

B

Question 3:

C

Whether a third party and/or third parties, who are neither a director or a shareholder of a subject company in which proceedings are brought pursuant to s 181 of the Companies Act 1965 (now s 346 of the Companies Act 2016) may be visited with liability, whether jointly and/or severally, for acts within the ambit of the said s 181 (now s 46 of the 2016 Act)?

D

Question 3.1:

If in the affirmative, the circumstances in which such third party and/or third parties may be visited with liability?

E

[8] It is necessary to comprehend the essential facts relating to the appeal. This begins with the relevant parties to the appeal.

F

THE PARTIES

[9] The parties will be referred to as they were in the High Court. The *appellant* here, Auspicious Journey Sdn Bhd ('Auspicious Journey') was the plaintiff in the High Court and the *minority shareholder*, holding twenty per cent (20%) of the shares in a company known as Ebony Ritz ('Ebony Ritz').

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[10] *Ebony Ritz* was the first defendant in the High Court and the subject company in relation to the proceedings under s 181 of the CA 1965. It is a nominal defendant. It is the first respondent in this appeal.

H

[11] Hoe Leong Corporation Ltd ('Hoe Leong') was the second defendant in the High Court. It is the majority shareholder of the subject company, Ebony Ritz, holding eighty per cent (80%) of the shareholding. It is the second respondent in this appeal. Hoe Leong is a corporate entity which is listed on the Singapore Stock Exchange.

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[12] Kuah Geok Khim or Paul Kuah ('Paul Kuah') was the third defendant in the High Court. He is a director of both Hoe Leong, the second defendant as well as the subject company, Ebony Ritz, the first and nominal defendant.

Paul Kuah is the third respondent in this appeal.

[13] Kuah Geok Lin or James Kuah ('James Kuah') was the fourth defendant in the High Court. Like his brother, Paul Kuah, he is both a director of Hoe Leong as well as the subject company, Ebony Ritz. James Kuah is the fourth respondent in the present appeal.

[14] The third and fourth respondents, Paul Kuah and James Kuah are known collectively as the Kuah brothers in this appeal. With respect to the Kuah brothers, it is in their capacity as directors of Ebony Ritz that this appeal is brought. This is of significance because Paul Kuah and James Kuah were at all times also directors of Hoe Leong.

[15] The fifth respondent, Setinggi Holdings was the tenth defendant in the High Court. It has been dissolved and accordingly, Auspicious Journey will not be proceeding against it.

[16] The sixth respondent, Teh Teong Lay was the 11th defendant in the High Court. He was at all times the sole director and sharehol der having control of Setinggi at all times. Although Auspicious Journey has discontinued proceedings against Setinggi Holdings, it is maintaining its action against Teh Teong Lay in his capacity as Setinggi's director.

FACTS

Auspicious Journey

[17] Auspicious Journey and Hoe Leong entered into a joint venture to form a joint venture company, namely Ebony Ritz on 11 March 2010. The joint venture was formed specifically to undertake the acquisition of 49% of the shares in a company known as Semua International Sdn Bhd ('Semua International') which had been involved in the tanker chartering business for over 20 years.

[18] Under the joint venture between Auspicious Journey and Hoe Leong, Auspicious Journey was the minority shareholder in the joint venture company, Ebony Ritz, holding 20% of the shares, while Hoe Leong was the majority shareholder, holding 80% of the shares.

[19] Ebony Ritz appointed three directors. Auspicious Journey nominated one director, Andy Kuek while Hoe Leong nominated two directors, namely Paul Kuah and James Kuah, ie the Kuah brothers.

The acquisition of 49% shareholding in Semua International by Ebony Ritz

[20] Semua International was (prior to its acquisition) a wholly-owned subsidiary of Sumatec Resources Bhd ('Sumatec'). Sumatec is an entity with shares listed and quoted on Bursa. Ebony Ritz was to acquire 49% of Sumatec's shareholding in Semua International for a consideration of RM44.1m.

[21] After such acquisition, the proportion of shareholding in Semua International would be 49:51 in favour of Ebony Ritz and Sumatec re spectively. This meant that Ebony Ritz would acquire a significant interest in the oil tanker chartering business of Sumatec through the said acquisition of the 49% shareholding in Semua International.

[22] It is also pertinent that Sumatec had pledged or created security rights in favour of its bondholders represented by Malaysia Trustees Bhd, over its remaining 51% interest in Semua International.

The several agreements executed on 5 May 2010

[23] Ebony Ritz entered into a sale and purchase agreement dated 5 May 2010 with Sumatec to purchase 49 % of Sumatec's shares in Semua International for RM44.1m. Hoe Leong contributed 80% of the purchase price while Auspicious Journey contributed 20%.

[24] On the same date, an options and financial representation agreement ('OFRA') was entered into between Ebony Ritz, Sumatec and Auspicious Journey granting certain rights and entitlements to Ebony Ritz and Auspicious Journey. Among others, the OFRA provided:

(a) an unconditional and irrevocable guarantee by Sumatec to Ebony Ritz to make good any shortfall in the event Semua International's audited profit after taxation falls short of the financial representations made by Sumatec ('profit shortfall guarantee');

(b) in the event of a shortfall, various options were granted to Ebony Ritz to satisfy the profit shortfall guarantee. This included an irrevocable grant of a call option by Sumatec to Ebony Ritz, the exercise of which would require Sumatec to sell not less than 2% of the issued and paid up capital of Semua International to Ebony Ritz ('2% call option'). This option, if exercised, would give Ebony Ritz a majority stake and control over Semua International; and

(c) an irrevocable grant of a call option by Sumatec to Auspicious Journey, the exercise of which would require Sumatec to sell not less than 49% of the shares in Semua International to Auspicious Journey ('49% call option'). This would effectively denude Sumatec's retained 51% shareholding, given the 2% option granted to Ebony Ritz as outlined above.

[25] On the same date, Ebony Ritz, Sumatec and Semua International entered into a shareholders' agreement for the purpose of regulating their relationship as shareholders of Semua International as well as the conduct of the affairs of Semua International.

[26] Additionally, Ebony Ritz and Semua International entered into a loan agreement called the Ebony Ritz Loan Agreement, pursuant to which an interest free term loan facility of RM10m was granted by Ebony Ritz to Semua International to be utilised by Semua International towards its working capital requirements in relation to its oil tanker chartering business. This was funded by the shareholders of Ebony Ritz in proportion to their respective shareholding namely RM2m from Auspicious Journey and RM8m from Hoe Leong.

[27] As set out comprehensively in the grounds of the Court of Appeal, between March and September 2010, there were several contractual expectations envisaged vis a vis Ebony Ritz and Sumatec in relation to the oil charter tankering business of Semua International. This included Ebony Ritz accepting that it had to see through payment of certain historical dividends from the oil tanker chartering business to Sumatec. There were also express obligations between the parties which required Sumatec to make proportionate shareholders' advances for the oil t ankering business. And Sumatec was to spearhead the intended listing of Semua International on Bursa Malaysia so as to increase its market capitalisation with further contractual terms governing an intended disposal by Sumatec to the co-investors of its remaining 51% shareholding investment in Semua International.

[28] However, these contractual expectations were not met by reason, inter alia, of the following events:

(a) in October 2010 the business required cash advances from the RM10m facility to be made to it but neither Sumatec or Auspicious Journey made the proportionate contribution. However these advances were subsequently made in January 2011 as envisaged by the RM10m facility;

(b) the oil tanker chartering business was under severe financial distress with Hoe Leong as the majority shareholder having advanced in excess of RM38m directly into the business; and

(c) Sumatec went into financial distress itself and sought court protection orders from its creditors pursuant to the then s 176 of the CA 1965, while Sumatec's bondholders were asserting their security rights over the 51% shareholding and calling upon Sumatec to provide a proposal to remedy the default pursuant to which they would exercise their rights.

[29] Unsurprisingly there was a profit shortfall for the financial year 2012

A and Sumatec was required to make good the profit shortfall pursuant to the OFRA. Accordingly vide letter of 4 September 2012, Ebony Ritz gave notice to Sumatec as to the profit shortfall and required Sumatec to make good the same in the sum of approximately RM27m under the OFRA. Sumatech was unable to make good this sum. It also failed to comply with its obligations under the B OFRA in relation to the profit shortfall guarantee.

[30] Auspicious Journey then discovered that on 21 December 2012, Hoe Leong had entered into a conditional sale and purchase agreement with Setinggi Holdings, Ebony Ritz and Sumatec for the disposal of the entire C retained 51% equity interest of Sumatec in Semua International ('conditional agreement'). This was to allow for a structure in the form of a warehousing arrangement with a view to enabling Hoe Leong to take control of the oil tanker chartering business. Auspicious Journey had no idea that these D arrangements had taken place.

[31] What were the terms of this conditional agreement? The effect of the conditional SPA was that 2% was to be purchased by Hoe Leong for RM1.8m and 49% was to be purchased by Setinggi for RM17m. This would mean that E the entire retained 51% would be held by Hoe Leong as Setinggi was in effect its nominee.

[32] Auspicious Journey's grievance as a minority shareholder of Ebony Ritz may be summarised as follows:

F

(a) the 2% shareholding in Semua International which ought to have been sold to Ebony Ritz was sold to Hoe Leong for a cash consideration of RM1.8m payable by Hoe Leong and put into an escrow account;

(b) the remaining 49% was sold to Setinggi for a cash consideration of G RM17m payable by Setinggi Holdings (a nominee of Hoe Leong) within 24 months of consent being procured from the bondholders. This 49% share option was that of Auspicious Journey, not even Ebony Ritz. Auspicious Journey had lost its option to purchase the same;

H (c) the conditional SPA provided that the rights under the profit shortfall guarantee and Ebony Ritz's 2% call option which had already accrued, were waived or relinquished by Ebony Ritz; and

(d) the conditional SPA further provided for the provision of an indemnity by Ebony Ritz for the due performance of an obligation to be undertaken I by Hoe Leong and the reassignment of dividends payable to Sumatec by Semua International.

[33] Why and how had this series of supervening events in breach of the several OFRA agreements occurred? Hoe Leong's explanation was that when

Sumatec and Semua International ran into financial difficulties, the joint venture fell apart due to Auspicious Journey wanting to extricate itself from its investment but Hoe Leong wished to continue. In these circumstances, in order to salvage the enterprise, Hoe Leong maintained that it was necessary to enter into the conditional agreement, which was effectively a salvage and warehousing arrangement. It is pertinent that the conditional SPA never became unconditional and the sale did not go through.

[34] In March 2013, Auspicious Journey became aware of the salvaging and warehousing arrangement. By April 2013, Auspicious Journey realised that Setinggi Holdings was the nominee utilised for the 49% shareholding investment in Semua International under the salvage and warehousing arrangement. It was also made known to Auspicious Journey that Hoe Leong was prepared to pla ce the all-important 2% shareholding in Semua International into Ebony Ritz, provided Auspicious Journey came up with its proportionate contribution for the same. Auspicious Journey however, refused.

[35] Auspicious Journey, as a minority shareholder who had not been made privy to these important decisions on behalf of Ebony Ritz (and itself) was naturally disgruntled. Accordingly, it filed the present originating summons against the defendants, contending that the 51% SPA had expropriated its rights as well as Ebony Ritz's rights under the OFRA. The latter had affected Auspicious Journey's rights as a minority shareholder. Ebony Ritz was a nominal defendant. The fifth to ninth defendants (Quah Yoke Hwee, Boo Song Heng Peter, Ang Siew Koon, Ang Mong Seng and Lim Kok Hoong) were the other directors of Hoe Leong at the material time in addition to James and Paul.

[36] As skilfully summarised by the Court of Appeal (and which I now adopt) Auspicious Journey maintained that its claim fell within the ambit of s 181 of the CA 1965 by reason of the conditional SPA which demonstrated that Hoe Leong had utilised its majority powers to cause Ebony Ritz to enter into the conditional SPA, for its own benefit (through its nominee Hoe Leong), to the ultimate detriment of Auspicious Journey as a minority shareholder of Ebony Ritz. This was borne out, inter alia, by the following matters:

(a) Ebony Ritz's 2% call option was expropriated by Hoe Leong at Ebony Ritz's expense;

(b) Auspicious Journey's own 49% call option was expropriated by Hoe Leong and its nominee which caused detriment and was prejudicial to Auspicious Journey;

(c) in order to achieve the foregoing, Hoe Leong and the Kuah brothers had utili sed Hoe Leong's majority powers to waive Ebony Ritz's entitlements under the profit shortfall guarantee and Ebony Ritz's 2% call option; and

(d) Hoe Leong and the Kuah brothers had also caused to furnish an indemnity to keep Sumatec indemnified in the event any claims were made against Sumatec. There was also a re-assignment of dividends previously payable such that all previous conditions were waived. This was clearly to the detriment of Ebony Ritz.

[37] In summary, Auspicious Journey sought a declaration that Hoe Leong as the majority shareholder, and the Kuah brothers as directors:

(a) conducted the affairs of Ebony Ritz in a manner that was oppressive to Auspicious Journey and in disregard of its interests as member of Ebony Ritz; and

(b) had procured and/or caused to be done and/or threatened to procure or cause to be done to Ebony Ritz an event/s which unfairly discriminated against or which was or is prejudicial to Auspicious Journey as a member of Ebony Ritz.

[38] What was Hoe Leong's response? In brief, Hoe Leong contended that Auspicious Journey brought this action to recover its investment in Semua International, by, inter alia, having its 20% sharehold ing in Ebony Ritz bought over by Hoe Leong.

THE DECISION OF THE HIGH COURT

[39] The High Court allowed Auspicious Journey's claim in part. It made findings of fact that the matters set out above were proven. This resulted in a finding in law that the affairs of Ebony Ritz were conducted in a manner oppressive to, and which discriminated against or prejudiced Auspicious Journey, the minority shareholder. However, the High Court dismissed Auspicious Journey's claims against the other defendants, including the Kuah brothers in their capacity as directors of Ebony Ritz, who had been instrumental in determining the supervening events resulting in the entry into the conditional SPA.

[40] The findings of the High Court which are relevant for the purposes of the present appeal are:

(a) the only issue for determination in a minority oppression action is whether there has been oppression by the majority shareholder;

(b) the directors are not liable for the actions of the company as the directors are agents of the company;

(c) on the evidence before the court, the breaches of the respective contracts were in the best interest of Hoe Leong in respect of its investment in

Semua International. The directors were entitled, if not obligated to take such steps in the exercise of their directors' duties, following the Supreme Court of Newfoundland case of *Imperial Oil Ltd v C & G Holdings Ltd* [1990] 62 DLR (4th) 261 ('Imperial Oil') which was adopted into Malaysian jurisprudence by the High Court in *Q2 Engineering Sdn Bhd v PJI-LFGC (Vietnam) Ltd & Ors* [2013] 8 MLJ 157 ('Q2 Engineering'); and

(d) in our own country, the Court of Appeal in *Abdul Manaf Mohd bin Ghows & Ors v Nusantara Timur Sdn Bhd & Ors* [1997] 3 MLJ 661 ('Abdul Manaf') cited with approval the trial judge's statement that a director is merely acting as an agent of the company and would not be personally liable for the acts of the company unless express written provisions exist to impose personal liability on them.

REMEDY

[41] The High Court also decided that the most appropriate course of action was to wind up Ebony Ritz, as having regard to the financial situation of Ebony Ritz and the disagreement between the shareholders, it was not viable to keep it as a going concern. The relationship between the shareholders had broken down completely and it was neither just nor equitable for the company to proceed. Moreover, the ultimate purpose for the joint venture had not been, and could no longer be met.

[42] Significantly, the High Court took into account the fact that if a buy-out of Auspicious Journey's shares was ordered, Semua International would be in breach of the provisions of the Merchant Shipping Ordinance 1952 ('the MSO') which requires any company involved in the oil tanker industry to be a majority-Malaysian company.

[43] Auspicious Journey appealed against the decision of the High Court to dismiss the action against the defendants other than Ebony Ritz and Hoe Leong. It also took issue with the High Court decision to wind up Ebony Ritz. Meanwhile, Hoe Leong appealed against the High Court's findings that it was liable.

THE COURT OF APPEAL DECISION

[44] The Court of Appeal dismissed both appeals.

[45] In respect of Auspicious Journey's complaint that the High Court ought to have ordered a buy-out of its shares in Ebony Ritz instead of winding it up, the Court of Appeal agreed with the High Court that this was not an appropriate relief considering the fi nancial circumstances of Ebony Ritz.

A **[46]** The Court of Appeal held that to order a buy-out would unjustly enrich Auspicious Journey, and that it should not be allowed to use these s 181 proceedings to divest itself of a bad bargain. Further, the buy-out would alter Ebony Ritz's position because the consequence would be that Semua International would be a wholly-owned subsidiary of Hoe Leong, a B Singaporean entity, thus violating s 11 of the MSO.

[47] The Court of Appeal also concurred with the High Court that the breakdown in the relationship between the parties as a factor t hat was relevant and correctly applied by the High Court to order that Ebony Ritz be wound C up. The Court of Appeal additionally expressed the view that it would not be appropriate for the court to make a buy-out order when such an order would not be meaningful because the company is no longer a going concern.

D **[48]** In respect of Auspicious Journey's attempt to extend liability to the directors of Hoe Leong, the Court of Appeal affirmed the decision of the High Court that it was trite that the directors could not be held personally liable for the acts of the company, unless it was a personal act or wrongdoing by the directors and that act is outside its obvious agency. The Court of Appeal also E held that to make a finding of liability against the directors would necessitate an order for damages against them but this would result in double recovery for Auspicious Journey.

[49] In respect of Auspicious Journey's claim against Setinggi and its F director, the Court of Appeal affirmed the High Court decision to dismiss the case against them. The Court of Appeal noted that the 51% SPA was a conditional one with the purpose of creating a warehousing arrangement. However, the warehousing arrangement did not pan out and Setinggi had not proceeded with the purchase of the 49% stake in Semua International, thus the G position reverted back to what it was pr ior to the 51% SPA. Therefore, particularly as Auspicious Journey was not interested in asserting its right to acquire the said 49% interest, Auspicious Journey had no tenable claim against Setinggi Holdings and Teong Lay.

H **[50]** The Court of Appeal emphasised that this was all the more so, since Auspicious Journey maintained that Setinggi was no longer a nominee of Hoe Leong. Therefore, any complaint on the warehousing arrangement had by Auspicious Journey should have been properly directed against Hoe Leong.

I **[51]** The findings against Hoe Leong as a company were affirmed by the Court of Appeal and there was no appeal to the Federal Court. Only Auspicious Journey filed an application for leave to appeal. Thus the findings against Hoe Leong as a company are now final and conclusive. Consequently, the issue which is of concern in this appeal is whether the courts below were

right in refusing to attach liability to the directors of Hoe Leong.

THE FEDERAL COURT PROCEEDINGS

The parties' submissions

The appellant's submissions

[52] Auspicious Journey submitted that question 1 ought to be answered in the negative while questions 2 and 3 ought to be answered in the affirmative.

[53] Questions 2.1 and 3.1 concern the circumstances in which a director and a third party may be made liable, and it is submitted by Auspicious Journey that the court ought to adopt the tests expounded in the canadian cases of *Wilson v Alharayeri* [2017] 1 SCR 1037 ('Wilson') and *Budd v Gentra* [1998] OJ No 3109 ('Budd') and/or the English case of *Fe&C Alternative Investments (Holdings) Ltd v Barthelemy & Ors* [2011] EWHC 1731 (Ch) ('F&C alternative'). Relying on the aforesaid cases, Auspicious Journey proposed that liability ought to be imposed where the director and/or third party is implicated in, or so connected to the acts or conduct on which the oppression proceedings are premised.

[54] Auspicious Journey further submits that our s 181 which traces its descent from the then s 210 of the UK Companies Act 1948 is wider in scope in comparison to the English s 210. Thus, our s 181 should receive an equal if not more liberal interpretation. it is also Auspicious Journey's contention that other commonwealth jurisdictions have adopted a liberal and purposive approach in the construction of applicable oppression provisions.

[55] On the issue of the joinder of parties, Auspicious Journey submits that the court's jurisdiction is wide and that besides members and shareholders, wrongdoers may be named as proper parties in a s 181 petition. Accordingly, it is Auspicious Journey's position that wrongdoers who are not members/shareholders may be found liable.

[56] Auspicious Journey asserts that question 1 should be answered in the negative because firstly, an application of the Abdul Manaf principle to s 181 is contrary to the purpose, intent and express wording of that provision. Secondly, it is inconsistent with commonwealth authorities which have attributed liability to non-member wrongdoers. Thirdly, the Abdul Manaf principle which extended liability to directors was made in the context of a contract case where the company was found liable to a third party for a breach of contract. This principle, according to Auspicious Journey, has no application to oppression proceedings which centre on the internal conduct of a company's

affairs vis a vis a minority shareholder. *Said v Butt* [1920] 3 KB 497 ('Said v Butt'), *Imperial Oil*, *Q2 Engineering* and *Scotia McLeod Inc et al v Peoples Jewellers Limited et al* 26 OR (3d) 481 ('Peoples Jewellers') deal with common law principles of contract or tort in relation to the personal liability of directors. In the instant case, the impugned conduct and acts of ebony ritz were undertaken by James Kuah and Paul Kuah. To apply *Abdul Manaf* to s 181 amounts to giving the directors of a subject company licence to act oppressively with impunity.

Question 2

[57] Flowing from the above, Auspicious Journey submits that question 2 should be in the affirmative since James and Paul Kuah were the persons undertaking the conduct and acts of Ebony Ritz which was held by the courts below to have come within the ambit of s 181. As directors of Ebony Ritz, James and Paul were equipped with full knowledge of Ebony Ritz's rights a nd entitlements.

[58] However, they had caused Ebony Ritz to relinquish the same by causing the abrogation of Ebony Ritz's 2% call option. James and Paul had also excluded Auspicious Journey and/or Andy Kuek from deliberating on the abandonment of Ebony Ritz's rights and the imposition of obligations on Ebony Ritz via the 51% SPA.

Question 3

[59] Auspicious Journey submits that this question should be answered in the affirmative due to the wide discretion the court enjoys under s 181 of the CA and because there are authorities which illustrate that liability and/or relief may be ordered against third parties. Teh, the sixth respondent, was the sole shareholder and director of Setinggi Holdings, a party to the 51% SPA. He signed the 51% SPA on behalf of Setinggi Holdings. Teh was also the Chief Financial Controller of Hoe Leong and directly involved in the negotiations on the terms and facilitated the entry of the 51% SPA. Thus, he was privy to and participated in the various corporate conduct and acts which were held to have come within s 181.

[60] On the Court of Appeal's finding that there was no basis to justify relief against Setinggi Holdings and Teh since Auspicious Journey was not interested in exercising the 49% Auspicious Journey call option, and given that Setinggi Holdings no longer has rights to acquire the 49% shares in Semua International, Auspicious Journey submits that these are ex post facto events which were not raised on affidavit.

The respondents' submissions

[61] The second, third, fourth and sixth respondents ('the respondents') base their defence on the trite legal principle that directors are agents of a company and are not personally liable for breaches or acts of the company, citing *Said v Butt*, *Imperial Oil*, *Abdul Manaf*, *Q2 Engineering*, and that the law recognises only a limited set of circumstances where a director of a company can be held personally liable for his or her actions. This may occur: (1) when the actions of a director are prohibited by statute; (2) where a director breaches his or her fiduciary duty to the company under statute/common law (not relevant to the present appeal); and (3) where a director is directly and personally involved in a wrongful act in a manner beyond the director's role as agent of the company, thereby giving rise to tortious claims against the director.

[62] According to the respondents, authorities such as *Peoples Jewellers*, *Normart Management Ltd v West Hill Redevelopment Co* [1998] OJ No 391 *Docket No C25986 ('Normart')* and *Leon Van Neck and Son Ltd v McGorman* [1998] OJ No 4813 ('Leon') establish that:

(a) a director is not liable for acts carried out as an agent of a company;

(b) a director will only be liable where he or she acts beyond the scope of his or her role as an agent of a company, so as to create a tortious action against the director or exhibit a separate identity or interest from that of the company; and

(c) in identifying whether the act of the director was beyond the scope of his or her role as an agent of the company, it is useful to enquire whether the director has personally benefitted from the same.

[63] The respondents' stance is therefore that *a director who has exceeded his or her role as an agent of a company may be visited with liability regardless of whether it is a s 181 minority oppression or otherwise.* The respondents argue that in the present case, personal liability cannot be imposed on James and Paul as the courts below had concurrently found that the acts complained of were carried by the third and fourth respondents in the best interest of Hoe Leong. Since those acts could not be said to be done outside the third and fourth respondents' role as agents of Hoe Leong, no personal liability could be said to arise. Auspicious Journey had not advanced the position that the third and fourth respondents had acted beyond their role as agents of Hoe Leong.

[64] In relation to question 3, the respondents acknowledge that liability may extend to third parties under the torts of conspiracy and breach of contract but deny that the same has been made out on the facts of the case. The respondents submit that injury caused by thir d parties to a company can be addressed by way of a derivative action and not an oppression action.

A **[65]** As for question 3, the appellant contends that whether Setinggi Holdings intended to harm Auspicious Journey's interest is immaterial. Following *Wilson* the provision governing oppression looks to the effect and not the intent of the oppressor.

B OUR ANALYSIS AND DECISION

[66] The pivotal question is whether the statutory remedy for minority shareholders in s 181 of the CA 1965 (now s 346 of the CA 2016) allows or provides for redress to be visited upon not only the majority shareholders, but also the directors of the company in question and third parties who have occasioned, or been instrumental or closely connected the course of conduct which is found to be oppressive or in disregard of their interests members (under limb (a)) or which unfairly discriminates against or is otherwise prejudicial to the members (under limb (b)).

[67] This issue will turn to no small extent on the construction to be accorded to s 181 in its entirety. As such a consideration of the history and background of the section is merited.

The law origins of the remedy under s 181 of the CA 1965

[68] Traditionally, both in this jurisdiction and others, particularly the United Kingdom, there was a long-standing judicial conservatism in relation to corporate law. This is relevant to Malaysia because we have generally looked largely to the United Kingdom (whether justifiably or otherwise) for guidance in applying the law. Jurisprudence followed the general path of non-interventionism in the internal management of company matters, given the existence of the twin corporate law principles of majority rule and the separate legal personality.

[69] Majority rule supports the position that it is legitimate for a majority of the shareholders to control the company through the appointment of directors, who in turn, have the responsibility of running the business of the company. If the majority are unhappy with the directors then they oust them. If they are prepared to overlook the wrong, then the majority principle dictates that it is not for the court to interfere with that decision of the majority (*Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189).

[70] The second principle of a company being a separate legal entity, separate from its members and its management, further insulated the conduct of the affairs of a company from being scrutinised by the judiciary. The concern was that the courts were not equipped to deal with, or assess business decisions, and

interference would jeopardise the company's independent status and business. Therefore if the company itself chose not to sue, then it was generally not appropriate for others to sue on its behalf (see *Foss v Harbottle*).

[71] These two principles coupled with judicial non-interference, resulted in minority shareholders having very little recourse against acts of the majority which were oppressive or detrimental to the minority in their capacity as shareholders (the common law did provide remedies prohibiting fraudulent or oppressive conduct. And the rule in *Foss v Harbottle* was rendered less harsh by the development of several exceptions particularly where there was a fraud on the minority).

STATUTORY REDRESS

[72] In our jurisdiction, statutory redress came in the form of s 181 when the CA 1965 was enacted. It was drawn on the pattern of the Australian Uniform Companies Act 1961 of the various states of Australia, but with amendments as appropriate due to the lapse of time and local conditions. It affords minority protection where majority rule has been abused. The interpretation of s 181 has been dictated primarily by judicial interpretation. To that extent, the majority's power has been curbed, when there is abuse, by both statutory and judicial intervention.

Section 181 of the CA 1965, now s 346 of the CA 2016

[73] Turning now to the express provisions of s 181 of the CA 1965 (now s 346 of the Companies Act 2016):

> (1) Any member or debenture holder of a company may apply to the Court for an order under this section on the ground —
>
> (a) *that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members* or debenture holders including himself *or in disregard of his or their interests as members, share holders* or debenture holders of the company; or
>
> (b) *that so me act of the company has been done* or is threatened or that so me resolution of the members, debenture holders or any class of them has been passed or is proposed *which unfairly discriminates against or is otherwise prejudicial to one or more of the members or debenture holders, including himself*.
>
> (2) *If* on such applicat ion *the Court is of the opinion that either of those grounds is established*, the Court may *make such order as the Court thinks fit* with the view to *bringing to an end or remedying the matters complained of*, and without prejudice to the generality of subsection (1), the order may —

A
(a) direct or prohibit any act or cancel or vary any transaction or resolution;

(b) regulate the conduct of the affai rs of the company in the future;

(c) provide for the purchase of the shares or debentures of the company
B by other members or debenture holders of the company or by the company itself;

(d) in the case of a purchase of shares by the company, provide for a reduction accoringly of capital of the company; or

(e) provide that the company be wound up. (Emphasis added.).
C

[74] Applying the law to the present fact situation it is evident that the member or shareholder in issue is Auspicious Journey. The company in issue is Ebony Ritz. The majority shareholder is Hoe Leong and the directors
D mentioned in the section refer to the di rectors of Ebony Ritz, namely the Kuah brothers. The section does not make reference to the Kuah brothers in their capacity as directors of Hoe Leong. The Kuah brothers wear two 'hats' so to speak, and their function as directors of Ebony Ritz must not be conflated with their function and capacity as directors of Hoe Leong.

E

[75] It is the conduct of the affairs of Ebony Ritz that is in issue and focus. In this case the courts below have found and confirmed that the affairs of Ebony Ritz were conducted in a manner oppressive to Auspicious Journey, in disregard of its interest as a member. While not articulated below, it is equally
F evident from the factual matrix and findings of fact which are not in dispute, that the acts of Ebony Ritz conducted through the directors, namely the Kuah brothers comprise conduct which unfairly discriminates against or is otherwise prejudicial to Auspicious Journey.

G
[76] In making a finding that oppression has been established it is important to bear in mind that either limb (a) or limb (b) or both limbs may well be satisfied under s 181 of the CA 1965. Often limb (b) is simply not examined or considered, although it equally affords basis for the legal test under s 181 of 'commercial fairness/unfairness' as expounded in the decisions of this court in
H *Pan Pacific Construction Holdings v Ngiu-Kee Corporation* [2010] MLJU 269; [2010] 6 CLJ 721 at p 735A (FC); *Jet-Tech Materials v Yushiro Chemical Industry Co Ltd* [2013] 2 MLJ 297 and *Looh Siong Chee v Numix Engineering Sdn Bhd* [2015] 4 MLJ 561.

I Does a construction of s 181 of the ca 1965 (now s 346 of the CA 2016) allow liability to devolve on directors?

[77] Moving onto the central question of whether liability can devolve on the directors of Ebony Ritz, it is clear from the use of the words in limb (a) that

the section envisages oppressive conduct as being established where either the 'affairs of the company are being conducted' or where the 'powers of the directors are being exercised in a manner oppressive …'. The fact that the words namely the 'exercise of powers by the directors in a manner that is oppressive to its members' are expressly stipulated is of significance. The words cannot be mere surplusage. The words envisage the court scrutinising how the powers of the directors of the company in issue are exercised. The directors are expressly identified in the section to enable the court to make a finding that particular directors for the majority have utilised their powers in a manner which has resulted in oppression to the minority, or is in disregard of the minority's interests.

[78] When limb (a), which expressly identifies the directors' exercise of powers as a basis for establishing oppression, is read with s 181(2) which in turn gives the court very wide powers to bring such conduct to an end, or to remedying the minorities' grievance, it follows that there is no prohibition against the court granting a remedy which encompasses the directors of the company personally. On the contrary, a construction of s 181(1)(a) and (2) reveals that the intention of the legislature was to allow the court the freedom to fashion a remedy it thought fit. That would encompass liability devolving on a director directly in circumstances where the director exercised his powers to:

(a) oppress the minority shareholder/s; or

(b) disregard their interests as members.

[79] Further, a reading of limb (a) of s 181(1) refers expressly to the 'conduct of the affairs of the company', which is a matter which falls within the management duties and powers of the directors, as they manage the company on behalf of the shareholders as a whole. Limb (a) therefore focuses on the acts of the directors expressly in the conduct of the affairs of the subject compa ny. That means that acts of the Kuah brothers (as Andy Kuek was unaware of these acts) in conducting the affairs of Ebony Ritz and materially, its effect on the minority shareholder, Auspicious Journey. These acts conducted by the Kuah brothers on behalf of Ebony Ritz had an oppressive effect on Auspicious Journey, in its capacity as a shareholder. This application of the law in limb (a) allows for the acts of the directors personally to be brought into focus expressly.

[80] Additionally, limb (b) of s 181 refers to an act of the company itself, or a resolution of the members, which unfairly discriminates against or is otherwise prejudicial to one or more of the members. In other words, limb (b) appears to concentrate on acts of the company and its members as compared to limb (a) which makes reference to the company itself as well as the directors' personal exercise of their powers. This latter construction, to my mind, allows for liability to devolve onto the directors personally.

[81] Support for such a construction is further borne out by the ambit of powers accorded to the court including the prohibition or varying of any transaction or resolution and the regulation of the conduct of the affairs of the company in future. This may very well involve sanctions against the directors in their personal capacity. Put another way, the series of acts set out in sub-s (2) of s 181 are not exhaustive provisions circumscribing the powers of the court in moulding relief. This is made clear by the words 'without prejudice to the generality of subsection (1)'. These words allow the court latitude to fashion a remedy that would include imposing liability on the parties or other persons, including directors, who have perpetrated the acts giving rise to the oppressive conduct.

[82] To that extent statute has cut across or intervened to make provision for personal liability of directors or third parties which is not available under contract law or the common law. Oppression, it should be borne in mind, is a minority shareholder remedy against those controlling the company. That will naturally include the directors who manage the company at the behest of the majority, as well as the majority itself. Therefore, relief against the directors is a natural and logical consequence, if they have indeed behaved oppressively to the minority. This is so by reason of the express provisions of s 181.

[83] This statutory remedy which has been specifically enacted to prot ect the minority, ought not to be confused with matters of contract and tort where an action is brought by a third party against the company as an entity. In such a context, a director is indeed an agent of the company and generally liability would devolve against the company itself and not the director. In an oppression situation, the dispute relates to matters between various actors within the company. The dispute arises inter-se between the minority and the majority who include the directors. The statute therefore does not proscribe or veto liability falling on actors such as directors provided the factual matrix warrants the imposition of such liability.

[84] As perceptively and astutely construed in the written submissions for Auspicious Journey, s 181 contemplates the 'affairs of the company' and 'acts of the company' from two vantage points. Firstly, at the management level which must encompass the directors. And secondly at the shareholder level. This bears out the fact that while the comp any is a separate legal entity it comprises two distinct organs, ie the board of directors and the members/shareholders respectively. Section 181 therefore targets conduct or acts of the company at both the directors and shareholders' levels. Bearing in mind that the statute seeks resolution for a dispute inter-se, as opposed to a dispute from a third party outside of the company, such a construction is legally rational and coherent.

[85] It might be said that there is no specific authority to support this

construction of the section, but it must be borne in mind that our s 181 of the CA 1965 (now s 346 of the CA 2016) is unique in that while it borrows portions and concepts from other jurisdictions, it is worded distinctively. As such it is necessary to co nstrue it as it reads, and not so as to be consonant with legislation in any other jurisdiction particularly. The legislature saw fit to word s 181 (now s 346) as it states, and accordingly judicial construction must accord the provision the intention Parliament sought fit to enact, namely a wide and broad remedy encompassing not only the majority, or the company, but also the directors and third parties where necessary, with a view to bringing the oppressive or prejudicial conduct to an end or remedying it.

[86] It is of equal importance to incorporate into this construction the purpose and intent of the legislature in enacting this statutory remedy. It is a remedial provision to arrest the mischief of the inadequacies of the common law in protecting the interests of the minority shareholders as examined earlier. Bearing in mind that judicial pronouncements have pointed out that our s 181 is wider in scope than the now repealed s 219 of the English Act, our statutory provision therefore requires a liberal and broad interpretation, not a narrow or restrictive one (see *Re Kong Thai Saw mill (Miri) Sdn Bhd* [1978] 2 MLJ 227 (Privy Council) ('Re Kong Thai') ; and *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd* [1996] 1 MLJ 113 (FC)).

[87] In any event, such an approach has been adopted in the construction of oppression provisions throughout the Commonwealth. This lends support to the liberal interpretation accorded to s 181 above.

[88] This is borne out by the decision of this court in *Koh Jui Hiong @ Koa Jui Heong & Ors v Ki Tak Sang @ Kee Tak Sang and another appeal* [2014] 3 MLJ 10 at p 28 C–G ('*Koh Jui Hiong v Ki Tak Sang*') where it was held:

> [26] Damages to members is not amongst the reliefs mentioned in s 181(2) which provides that 'If on such application the court is of the opinion that either of those grounds is established the court may, with the view to bringing to an end or remedying the matters complained of make such order as it thinks fit and without prejudice to the generality of the foregoing the order may (a) direct or prohibit any act or cancel or vary any transaction or resolution; (b) Regulate the conduct of the affairs of the company in future; (c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company it self; (d) in the case of a purchase of sha res by the company provide for a reduction accordingly of the company's capital; or (e) provide that the company be wound up. That is not however to say that the court could not award any other relief. Section 181(2) is a non-exhaustive list that does not limit other types of relief that the court could fashion, with the view to bringing to an end or remedying the matters complained of (see *Company Law in Context, Text and Materials, by David Kers haw* at p 635). As said by Lord Wilberforce in Re Kong Thai Saw mill, s 181 'leaves to the court a wide discretion as to the relief which

it may grant, including among the options that of winding the company up'. That discretion is evidently wide enough to order reliefs not mentioned in s 182(2) ...

OTHER JURISDICTIONS

[89] Having construed our specific oppression remedies as contained in s 181 of the CA 1965 (and now s 346 of the CA 2016), it must be said that t he statutory oppression regime in other jurisdictions such as Singapore, the United Kingdom and Australia, while employing differing terminology, share the common purpose of protecting minority shareholders against abuse of majority power. Consequently, it is instructive to examine the jurisprudence in the aforementioned countries to determine the breadth of their equivalent provisions with a view to ascertaining whether the reach of their oppression provisions extends to directors of the subject company or third parties (see Chew, Margaret, *Minority Shareholders' Rights and Remedies* (3rd Ed) (Singapore: LexisNexis, 2017) at p 177, *Ho Yew Kong v Sakae Holdings Ltd* [2018] SCGA 38 at para [96].)

United Kingdom

[90] In the UK, the introduction of the unfair prejudice remedy via statute(s 994 of the English Companies Act 2006 provides as follows:

994 Petition by company member

(1) A member of a company may apply to the court by petition for an order under this Part on the ground —

(a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or

(b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

(1A) For the purposes of subsection (1)(a), a removal of the company's auditor from office —

(a) on grounds of divergence of opinions on accounting treatments or audit procedures, or

(b) on any other improper grounds, shall be treated as being unfairly prejudicial to the interests of some part of the company's members.

(2) The provisions of this Part apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law as they apply to a member of a company.

(3) In this section, and so far as applicable for the purposes of this section in the other provisions of this Part, 'company' means —

(a) a company within the meaning of this Act, or

(b) (omitted).

Empowered the courts to grant relief in ways which allows liability to lie against directors in respect of their conduct of the affairs of the company or their acts or omissions: *Mortimer, Simon, ed, Company Directors: Duties, Liabilities and Remedies* (2nd Ed) (UK: Oxford University Press, 2013), 534.

[91] As submitted by the appellant, in the English case of *Re Little Olympian* [1994] BCLC 420, the English High Court considered their then equivalent of our s 181 (ss 459 and 461 of the UK Companies Act 1985) and held that 'the greatest possible flexibility' was intended by the legislature to be given to the courts. It was further held that in appropriate cases, relief can be sought against a non-member other than the company itself (see also *Re Tobian Properties* [2013] 2 BCLC 567 where the concept of fairness in the phrase 'unfairly prejudicial' in s 994(1) of the UK Companies Act 2006 was construed to mean 'flexible and open-textured' allowing the court a wide power to mould the appropriate relief to produce a just remedy).

[92] The allowance for a wide and liberal construction to mould a remedy flexibly envisages, by logical inference, the ability to mould a relief against, inter alia, directors and/or third parties, where the facts justify it, in order to bring the oppression to an end or to remedy it.

[93] In *Re Sunrise Radio* [2010] 1 BCLC 367 at 436 a-d (EWHC) the English High Court found that unfair prejudice had been established and held individual respondents who were shareholders and/or directors of the subject company responsible for the acts complained of. In coming to this conclusion, the English High Court scrutinised the conduct of the directors and found their conduct to be unfairly prejudicial. This included, inter alia, the dilution of the minority petitioner's shareholding through the allotment of new shares in the subject company to the majority shareholder at nominal par value and the failure to obtain shareholders' approval for a sale of the subject company's property to one of the directors.

[94] In *Re Little Olympian (No 3)* [1995] 1 BCLC 636 at 666f–g and 684 g–I (EWHC) the English High Court found a scheme to hive up the assets of a subject company at a substantial undervalue to be 'unfairly prejudicial' which is the term utilised under the relevant United Kingdom legislation. A buy-out was consequently made against the former shareholder of the subject company who was found to be the perpetrator and beneficiary of the scheme. The remedy was granted against a third party.

Canada

[95] In Canada too, the courts have adopted this approach, namely that the oppression provis ion should be interpreted broadly in order to carry out the purpose of the legislature. To that extent the courts there have repeatedly stated that they are conferred with a wide jurisdiction and discretion to fashion a remedy that will achieve fairness on the given facts of a case. In *Ferguson and Imax Systems Corp* [1983] OJ No 3156 at para 30 (Ontario Court of Appeal) — 'But section 234 must not be regarded as being simply a codification of the common law. Today one looks to the section when considering the interests of the minority shareholders and the section should be interpreted broadly to carry out its purpose …'.

[96] And in *BCE Inc v 1976 Debentureholders* [2008] 3 SCR 560 at paras 56–59 (Supreme Court of Canada) in construing the best approach to the interpretation of the Canadian equivalent of the oppression provision under the Canada Business Corporations Act 1985, held that the principles underlying the oppression remedy should first be looked at. As it is an equitable remedy, it seeks in essence to ensure fairness. Therefore, the courts have a broad jurisdiction and 'should look at business realities and not merely narrow legalities'. (see also *Catalyst Fund General Partner I Inc v Hollinger Inc* 79 OR (3d) 288 at paras 49 and 54 (Ontaria Court of Appeal) where the Canadian Court of Appeal reiterated that the court's powers under their oppression provision was 'amongst the broadest and most flexible of the powers vested in the courts in the corporate law domai n' and should be exercised judicially in a manner consistent with the legislative intent and statutory object.

[97] In the context of our jurisdiction our equally broad s 181 (now s 346) would also point to relief being available to a broad range of persons, when construed in the same spirit, namely to give effect to legislative intent and statutory object, namely to afford fairness to the oppressed minority. This would necessarily include directors and third parties, if so justified on a particular factual matrix, with a view to bringing the oppression or prejudicial conduct to an end, or affording a remedy for it to the minority shareholder.

Hong Kong

[98] Similarly, in Hong Kong the oppression provisions have been construed widely and liberally having regard to the object of the applicable provisions. In *Nina Kung v Tan Man Kou* [2004] HKCU 1453 at para 39 the Hong Kong Court of Final Appeal held that 'there is no doubt about the width of the statutory language of s 168A(2)' and adopted the English position in *Re Little Olympian*. This is a clear nod to the imposition of liability on parties other than the majority shareholder.

Joinder of directors and third parties as respondents in an oppression petition

[99] The fact that third parties and directors may be made respondents to an oppression action further supports the construction that liability may devolve upon such respondents. This is because it follows that if directors and third parties are proper parties for the purposes of a joinder application, then relief should accordingly be available against them. Otherwise it would be pointless to allow them to remain as respondents or defendants, if no redress or relief is available against them at all.

[100] There is nothing in our s 181 of the CA 1965 (now s 346 of the CA 2016) specifically saying that only members of the company, its directors, or those in control of the company may be made respondents. There is authority for the proposition that all alleged oppressors are proper parties, including third parties who participated in the transactions forming the substratum of the complaint and parties who are affected by the relief sought: *Re BSB Holdings Ltd* [1993] BCLC 246, *Foo Ban Byen v Foo Yet Kai & Sons Sdn Bhd & 6 Ors* [1991] 2 CLJ 1364, *Re Little Olympian Each-Ways Ltd* [1994] 2 BCLC 420.

[101] An instance where the court joined non-members who participated in the impugned conduct is reflected in the case of *Kejutan Holdings Sdn Bhd v Magnum 4D (Perak) Sdn Bhd & Ors* [2005] 2 CLJ 766 ('Kejutan'). Here the court dismissed the eighth and ninth respondents' application to cease to be parties to the petitioner's s 181 petition on the ground that the petition contained specific allegations of misconduct and fraud against them. The eighth and ninth respondents were third party companies. The court held that in the face of those allegations, it was imperative that the eighth and ninth respondents address or respond through affidavits to the allegations made against them. This approach envisaged that liability would fall on these third parties if the allegations were made out.

[102] In a similar vein, in the United Kingdom, Vinelott J declined to strike out B Sky B as a respondent in *BSB Holdings* because it was directly involved in the transaction complained of and the relief being sought for by the petitioner would affect B Sky B's shareholding.

[103] So too in *Paul Murray-Jones v Hong Kong and Shanghai Banking Corporation & Ors* [1982] HKC 127 where the petition er joined the bank, the subsidiary of the bank which held shares in the company, and four nominee directors of the bank in the company as respondents. In refusing to strike out the four nominee directors as respondents, the court said at p 131 that:

> It is not necessary for us to decide whether the nominee directors could properly be ordered to buy the petitioner's shares: the petitioner has, perhaps sensibly not asked

A that they should. *Nevertheless, it may appear at the trial that some other order could properly be made against them personally*. The fact that an order against the company might indirectly have the same effect does not seem to me to be a bar to the making of a direct order. It is for the petitioner to decide whom he will join and only if it were clear that no possible benefit could accrue to him from the joinder of the nominee directors could it fairly be held that the proceedings against them were an abuse of the process. *The powers of the court under s 168A are so wide that I am not prepared to say that no possible benefit might result from the joinder.* (Emphasis added.)

[104] While the above authorities establish that the court indeed has wide jurisdiction to add relevant parties to an unfair prejudice action, they do not deal with the *basis* or rationale premised on which a director or a third party may be made personally liable for oppressive conduct.

The underlying rationale for making a director or a third party personally liable for oppressive conduct United Kingdom

[105] In the English case of *F&C Alternative Investments (Holdings) Ltd v Barthelemy and another (No 2)*; *Barthelemy and another v F&C Alternative Investments (Holdings) Ltd and others (No 2)* [2012] Ch 613 ('F&C Alternative') the court held that that the test of attribution of responsibility for unfairly prejudicial conduct to a defendant under the relevant provisions of the *UK Companies Act 2006*, beyond the narrow class of case where an agency relationship existed, was *whether the defendant was so connected to the unfairly prejudicial conduct in question that it would be just in the context of the statutory regime to grant a remedy against him in relation to that conduct.*

[106] In relation to the criterion of what was 'just', Sales J acknowledged at para 1096 that:

> In practice, every thing will depend upon the *facts of a particular case and the court's assessment whether what was done involved unfairness in which the relevant defendant was sufficiently implicated* to warrant relief being granted against him. (Emphasis added.)

[107] In *F&C Alternative*, a limited liability partnership ('the LLP') was constituted between two individual members, Culligan and Barthelemy, and a corporate member, F&C Alternative Investments (Holdings) Ltd ('Holdings'). Holdings is part of the F&C group of companies, which carry on a range of businesses in the field of asset management. The head company in the group is F&C Asset Management plc ('F&C plc'). Holdings is a wh olly-owned subsidiary of F&C plc. The individual members brought an action against Holdings and F&C plc alleging unfair prejudice in the affairs of the LLP. *The court held that while F&C plc might have been one step removed from the affairs of the LLP in that it was not a party to the partnership agreement, it should be held liable for the unfair prejudice that arose from the acts of Holdings as its subsidiary*

was in reality a 'cipher' for the F&C group, and F&C plc in particular.

[108] The 'sufficient connection' test propounded in *F&C Alternative* was the subject of further consideration by Asplin J in *Destiny Investments (1993) Ltd and another v TH Holdings Ltd (formerly Tonstate (Hotels) Ltd) and others; TH Holdings Ltd (formerly Tonstate (Hotels) Ltd) and another v Destiny Investments (1993) Ltd and another* [2017] EWHC 657 (Ch). Here the court observed that the cases in which personal liability was extended were 'highly fact sensitive' and opined at para [158] that:

> ... merely being connected with the acts complained of cannot be enough. If that were the case, personal liability would be imposed in most cases be cause a company acts through its boa rd of directo rs. As a matter of logic, *moreis necessary*. In some circumstances, no doubt, relevant factors would be whether the company in question had been a mere cipher for the individual and wheth er that indiv idual had *benefitted*, for example, fro m the diversion of the co mpa ny's business or had otherwise benefitted from the unfairly prejudicial conduct.

[109] On the facts, although unfair prejudice was conceded, the directors were accepted to have acted in good faith. This, taken with the fact that the project itself was always a speculative one where a sale was intended, led the court to rule that holding the directors primarily or secondarily liable would be overcompensating the petitioners by insulating them from the effects of the market.

[110] *In re Dinglis Properties Ltd v Dinglis and others* [2019] EWHC 1664 (Ch) the first respondent, Andreas, was the director and majority shareholder in the third respondent, a family company. Initially his shareholding was held in his own name but it was later transferred to the second respondent, a company incorporated in the British Virgin Islands.

[111] The petitioner, Andreas' son and a minority shareholder in the third respondent, brought a petition under s 994 of the UK Companies Act 2006 alleging that he had been unfairly prejudiced in his capacity as a minority shareholder of the company by the actions of the first and/or second respondents and sought an order that they purchase his shares. The petitioner alleged that the unfair prejudice had arisen, inter alia, from payments made from the company in respect of loan agreements and a consultancy agreement, which were initiated by the first respondent and in which he had a personal interest.

[112] The petitioner alleged that there had been a breach of the director's fiduciary duty under s 175 of the 2006 Act to avoid a situation in which he had, or could have, a direct or indirect interest that conflicted with the interests of the company.

[113] It was held that the petitioner had been unfairly prejudiced in his capacity as a minority shareholder by some of Andreas' actions. Given *Andreas' admitted status as sole owner and controller of the second respondent and given the fact that no distinction was made between them in the conduct of the petition*, it was just, in the context of the statutory scheme as a whole, to make an order requiring both to acquire the petitioner's shares. Thus, *liability was extended to third party held to be under control of majority director/shareholder as well as the majority director/shareholder.*

Canada

[114] In Canada, the Supreme Court in *Wilson* explained the circumstances in which a director may be held to be personally liable for oppression. In *Wilson*, the claimant's grievance arose from the dilution in value of a certain class of his shares compared to the more favourable treatment received by the president of the company vis a vis the latter's shares. The Canadian Supreme Court adopted the twin-fold approach as espoused by the Ontario Court of Appeal in *Budd* in deciding whether personal liability was to be extended to a director, namely:

(1) the oppressive conduct must be properly attributable to the director because of his or her implication in the oppression; and

(2) the imposition of personal liability must be fit in all the circumstances.

[115] In relation to (2), the Canadian Supreme Court fashioned four instructive indicia as guidance:

> First, the oppression remedy request must in itself be a *fair way* of dealing with the situation. It may be fair to hold a director personally liable where he or she has derived a personal benefit in the form of either an immediate financial advantage or increased control of the corporation, breached a personal duty or misused corporate power, or where a remedy against the corporation would unduly prejudice other security holders. These factors merely represent indicia of fairness. The presence of a personal benefit and bad faith remain hallmarks of conduct attracting personal liability, but like the other indicia, they do not constitute necessary conditions. The fairness principle is ultimately unamenable to formulaic exposition and must be assessed in light of all the circumstances of a particular case. Second, any order should go *no further than necessary* to rectify the oppression. Third, any order may serve only to *vindicate the reasonable expectations of security holders, creditors, directors or officers in their capacity as corporate stakeholders*. And fourth, a court should consider the general corporate law context in exercising its remedial discretion. *Director liability cannot be a surrogate for other forms of statutory or common law relief, particularly where it may be more fitting in the circumstances*.

[116] The Canadian Supreme Court, like its counterparts in other jurisdictions, similarly stressed that fashioning a fit remedy was a 'fact-dependent exercise'.

[117] On the facts, Wilson had played a 'lead role' in the board's discussions. Not only that, he had obtained a personal benefit because he was able to exercise his conversion rights in advance of the private placement while the complainant could not, which had led to an increase in Wilson's holdings and a dilution of the complainant's shares. Thus, the imposition of liability on Wilson was fair.

Singapore

[118] Moving on to Singapore, the Court of Appeal recognised in *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] SGCA 33 that the court has a wide discretion to fashion the appropriate remedy if oppression is established, which extends to *making orders for the errant shareholders or directors of the company concerned to make restitution to the company of moneys that they have wrongfully diverted from the company*: see para [118].

[119] In this case Sakae, the Company and Gryphon Real Estate Investment Corporation Pte Ltd ('GREIC'), whose shareholders at the material time included Andy Ong, Ong Han Boon and Ho, entered into a joint venture agreement in September 2010, under which the company was intended to be the vehicle through which the parties would invest in units at Bugis Cube, redevelop those units and sell them at a profit. Sakae was the minority shareholder in the company, while GREIC was the majority shareholder.

[120] Sakae left the management of the company to Andy Ong and Gryphon Capital Management Pte Ltd, a company controlled by Andy Ong which was established to manage the company's real estate investment. Over the years, Andy Ong masterminded the diversion of the company's assets to companies in the ERC Group by way of seven transactions. These wrongful transactions were uncovered in October 2012, leading Sakae to commence the oppression action.

[121] The trial judge allowed most of Sakae's claims, finding that six of the seven impugned transactions were oppressive to Sakae and that Andy Ong had breached the fiduciary duties which he owed as a director of Sakae. The judge also ordered the company to be wound up.

[122] The defendant-directors in *Sakae Holdings* who were sued by Sakae for breach of fiduciary duties for depriving the company of its assets argued that

wrongs alleged in the oppression action against them were essentially corporate wrongs reflective of the company's losses and therefore derivative in nature. Rejecting this line of argument, the Singaporean Court of Appeal held that where an act of oppression features both personal wrongs against the shareholder and corporate wrongs against the company, the court needs to consider the real injury that is complained of and the essential remedy that is sought in ascertaining whether an oppression claim brought under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) is an abuse of process ('the injury/remedy analytical framework').

[123] Regarding concerns of a risk of double recovery or prejudice to the creditors or shareholders of the company, the Court of Appeal explained that this should be dealt with by crafting the orders made in suitable terms to avoid such a risk.

[124] Andy Ong and Ong Han Boon were rightly found by the trial judge to be liable for oppression given their *deliberate involvement in the impugned transactions with full knowledge of the true effect of the transactions, considering that no argument was advanced by them to challenge the judge's findings on their involvement in the impugned transactions*.

[125] Restitutionary orders in favour of the company were granted to ensure a fair exit value for the oppressed member, in that any restitution received would go directly to the company, such that upon its winding up, all its shareholders (including Sakae) would receive the appropriate and due realisation of their investment in the company: see para [128].

Legal test to determine whether liability should be imposed on a director or a third party

[126] From the liberal construction accorded to s 181 of the CA 1965 (now s 346 of the CA 2016), and a detailed consideration of the jurisprudence from other jurisdictions, all of which seek to achieve the same underlying purpose of achieving fairness for minority shareholders where there has been abuse by the majority vide directors or third parties, it may be concluded that it is open to the courts in this jurisdiction to impose liability against directors or third parties provided there is a sufficiently close nexus between the oppressive or unfairly discriminatory conduct, or disregard of the minority's interests or otherwise prejudicial conduct and that party. It requires something more than the mere fact of their being directors who had conduct of the affairs of the company at the material time. It requires deliberate involvement in the impugned transactions, or a sufficiently close nexus, participation or connection to warrant the imposition of liability to directors or third parties.

[127] I would respectfully accept and adopt the reasoning as enunciated by the Canadian Supreme Court in *Wilson* as epitomising how an assessment is to be made as to whether in any given complaint of oppression, liability has been established against a director and/or third party.

[128] To that extent I restate the legal test applicable as follows:

(a) firstly, there should be evidence of deliberate involvement or participation in, or a sufficiently close nexus to the oppressive or detrimental or prejudicial conduct that the minority complains of, to warrant the attribution of liability to a director or third party;

(b) the imposition of liability should be fair or just in all the circumstances of the particular case;

(c) in assessing whether the imposition of such liability is *fair or just*, the court should be satisfied that the remedy results in fairness to the parties concerned as a whole. In this context, liability may well be more easily assessed and imposed where a director has breached his duties, acquired personal benefit or where his acts or omission will result in prejudice to other shareholders. However, the foregoing examples do not comprise conditions without which liability will not be imposed. Ultimately the facts and factual matrix of each particular case will determine whether or not the imposition of liability on directors and/or third parties is justified. Such an assessment is undertaken on an objective basis;

(d) the attribution or imposition of liability should be *circumspect*, going no further than is necessary to remedy the breach complained of or to stop the oppressive or prejudicial conduct;

(e) such imposition of liability must be reasonable, and serve to alleviate the legitimate concerns of the shareholders of the company in question;

(f) in exercising its powers under s 181 of the CA 1965 (now s 346 of the CA 2016) the court should bear in mind general corporate law principles, such that director liability does not become a substitute for other statutory relief or under the common law; and

(g) in summary, the question for the court is whether in the context of s 181 of the CA 1965 the defendant w as so connected to the oppressive, detrimental or prejudicial conduct that it would be fair and just to impose liability against him for such conduct.

Application of the law above to the present appeal

[129] The courts below declined to allow liability to be made out against the Kuah brothers in their capacity as directors of Ebony Ritz or the third parties

A Setinggi and Teh. In so declining the courts below relied on the proposition that as directors are agent s of the company no liability can devolve on them.

[130] To my mind, the courts below erred in law in adopting such a position, given the jurisprudence we have set out in detail above. In so determining the lower courts relied on a series of cases espousi ng the general corporate law position that directors stand in the place of an agent in relation to a company and to that extent are not liable for the acts of the company. The independent corporate legal personality prevails to preclude liability from devolving directly on the directors. While this may well be the general position, in the case of oppression, the legislature has provided specific statutory relief, and that must necessarily prevail over the general corporate law position in relation to relief from oppression for shareholders.

[131] I now turn to examine the cases cited by the courts below in declining to extend liability to the respondents:

(a) *Abdul Manaf Mohd Bin Ghow s & Ors v Nusantara Timur Sdn Bhd & Ors* [1997] 3 MLJ 661 ('Abdul Manaf'):

The vendors were the shareholders of a private limited company known as Seri Naga. Nusantara Timur entered into an agreement to purchase the entire shareholding of Seri Naga for RM1m, but subsequently defaulted on the balance purchase price of RM850,000. It was alleged that there was a subsequent agreement between the parties that the second and third respondents, who were directors of Nusantara Timur, undertook to assume liability personally for the balance of the purchase price. The vendors sued the three respondents for: (i) the RM850,000; (ii) interest from the date of default to date of judgment; (iii) interest on the judgment sum at 8%pa from the date of judgment to the date of realisation; and (iv) damages. The trial judge dismissed the vendors' claims against the directors.

The Court of Appeal affirmed the High Court's reasoning that *a director or an authorized officer of a company who executes an agreement on its behalf is merely acting as an agent of the company and is thereby not personally liable for the breaches or acts of the company*, unless there are express provisions in the agreement or other document to the contrary making the director or officer personally liable for the breaches or acts of the company.

It is evident that this case is on a completely different footing from the present appeal in that *Abdul Manaf* is not a case involving claims of oppression by minority shareholders. It is a case of the breach of contract by a company as purchaser (Nusantara Timur) in a sale and purchase transaction of shares with a third party vendor. When the third party vendor so ught to make the directors personally liable for a contract to

which only the company was party, it was correctly held that no liability could accrue to the directors, given that a company is a separate legal entity with its own corporate existence and per sonality. effected the company's will. This case therefore has no application in an oppression matter, where the dispute is *between shareholders of the company inter se*, as explained earlier. Moreover there is specific statutory provision for such a shareholder dispute, which is completely inapplicable in a situation such as *Abdul Manaf*. The utilization of *Abdul Manaf* is therefore, with respect, erroneous;

(b) *Said v Butt* [1920] 3 KB 497:

Here the plaintiff claimed damages from the defendant, the manager of the theatre, for maliciously procuring the proprietors of the theatre to break a contract for the admission of the plaintiff to the theatre. The court held that *if a servant acting bona fide within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken*.

Similarly, the application of *Said v Butt* is misconceived for the same reason why *Abdul Manaf ('above')* is inapplicable. As in *Abdul Manaf*, this was a situation where a third party was suing the manager of the company in tort for injury, more properly brought against the company itself. The principle of the case is instructive when dealing with a third-party claim brought against an agent acting within the scope of his authority, instead of the principal. The principal is the proper party. *Said v Butt* is authority for that proposition. It relates to the law of agency and/or employment. It does not deal with an oppression action, governed by a specific statutory provision under the companies authority for shareholder disputes in corporate law under a specific statutory provision relating to oppression;

(c) it is compelling to note that these cases which are governed by the Contracts Act 1950 or the common law, cannot override the specific statutory provision for oppression in the Companies Act. To that extent the lower courts erred in applying what is essentially the common law principles under general corporate law for transactions or claims involving third parties, rather than construing and applying s 181 of the CA 1965. There was confusion between the general corporate law concept of a director being an agent of the company in relation to third party transactions and claims, with the positio n of a director in the context of an oppression claim where the dispute is within the company between the shareholders inter se;

(d) *Imperial Oil Ltd v C & G Holdings Ltd* [1990] 62 DLR (4th) 261:

This was an action for specific performance of a contract or c ontracts relating to the operation of a service station. One of the questions was

whether the directors and shareholders of a company could be found liable in damages to a third party plaintiff for interfering with a contractual relationship between the plaintiff and the company itself, which was the first defendant in the claim. In short, the question was whether, in a claim based in contract for specific performance against a company, by a plaintiff who is a third party, the directors and shareholders of that company were liable for the tort of inducing a breach of contract between the company and the third party plaintiff.

The Newfoundland Court of Appeal held, inter alia, that a finding that a director is liable for wrongfully inducing breach of contract by the company, whose affairs he or she is directing, will require more than knowledge by the director that legal rights of others will be violated by his or her actions in bringing about the corporate breach. No presumption of intent can flow from that k nowledge because of the director's concomitant obligation to the company. A director will be immune from liability for procuring the breach where he or she acts bona fide within the scope of his or her authority in the best interests of the company. When n ot so acting, the director does not attract automatic liability unless the circumstances show that his or her dominating concern was focused upon depriving the complainant of its contractual benefits.

Again, this case is not authority for the proposition that directors and shareholders cannot be made liable in an oppression claim in relation to conduct by the directors which is oppressive and prejudicial to the minority shareholders. It is instead authority for the proposition that generally a director of a company will not be held liable for a breach of contract by a company simply because he executes or fails to execute acts on behalf of the company in the course of his duties as director. Again, this relates back to the ingrained principle that a company has its own legal personality and subsists separately from its directors and shareholders. It is only in exceptional circumstances that personal liability will be visited on the director as explained above. This situation however is somewhat removed from an oppression claim where the dispute is between shareholders inter se and can involve the exercise of directors' powers in an oppressive manner, as stipulated in s 181 of the CA 1965 (now s 346 of the CA 2016).

(e) *Q2 Engineering Sdn Bhd v PJI-LFGC (Vietnam) Ltd & Ors* [2013] 8 MLJ 157 here the court applied *Said v Butt* and *Imperial Oil* and held that for the tort of inducing a breach of contract to bite, the alleged inducer must necessarily be a 'stranger' to the contract alleged to have been broken as such.

As such, prior consultation by the first defendant with the parent company (the second defendant) or even another subsidiary (whether wholly owned or otherwise) (the third defendant) does not derogate or

diffuse the concept of separate legal entity so as to transform the decision of the first defendant to also become that of the third defendant under the tort of inducing a breach of contract.

The comments made earlier in relation to the distinction between contractual and tortious situations involving third parties as compared to oppression actions governed by statute are reiterated here. The application of such case-law is fundamentally erroneous.

[132] The respondents also rely on the case of *Peoples Jewellers* in support of their position. Here, the plaintiffs were purchasers of issued senior unsecured debentures of P Ltd. At the time the debenture s were issued, P Ltd. was a party to two agreements pursuant to which it was conditionally liable for certain obligations of companies in which it was a shareholder. The prospectus, debenture purchase agreement and the information package did not disclose those agreements. The plaintiffs sued the defendants (a firm of underwriters, a senior vice-president of that firm, and a firm of solicitors who acted for the plaintiffs and for P Ltd. at the material times), alleging that the existence of the undisclosed liabilities was crucial to their decision to purchase the debentures, that they relied on the documents in the information package in making their decision, and that the omission of any reference to the agreements in the information package and in the other information provided to the plaintiffs constituted an intentional or negligent material misrepresentation on the part of the defendants.

[133] The court held that to hold the directors of P Ltd. Personally liable, there had to be some activity on their part that took them out of the role of directing minds of the corporation. In this case, there were no such allegations. CG and IG were in a different position by virtue of being the two most senior executive officers of P Ltd. It was alleged against them that they were directly and personally involved in the marketing of the debentures and that they were involved in making certain representations personally which were relied upon by the defendants. The defendants had also made an allegation of negligent misrepresentation against both of them personally. While the authorities make clear that officers of corporations who are the directing minds of the corporation have the same identity of interest as the directors and thus the same immunity to suit, the action against CG and IG should not be dismissed at this stage simply because it was novel in law.

[134] The respondents' reliance on *Peoples Jewellers* is, with respect, misconceived for the same reasons. *Budd*, which laid the foundation for the test of attribution of liability subsequently developed in *Wilson*, jettisoned the view that *Peoples Jewellers* has any application to unfair prejudice proceedings by holding that when a remedy is sought against directors personally, a plaintiff is not attempting to circumvent the principles which govern the liabilities of

directors generally, but making a 'fundamentally different' type of claim than that dealt with in *Peoples Jewellers*.

[135] Two other cases cited to us by the respondents, namely *Normart* and *Leon* are also of limited assistance. *Normart* is authority for the proposition that personal liability may not attach to the directors of a company in a tortious action for inducing a breach of contract by said company unless the directors' actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own. As for *Leon*, there was a concession by the plaintiffs that none of the directors received a personal benefit which led to the court deciding tha t there no oppression in an unfair prejudice claim brought by a disgruntled creditor. Factually, that case differs materially from the present appeal.

[136] It follows from the above that the following guidelines may be discerned:

(a) the language of s 181 of the CA 1965 and now s 346 of the CA 2016, is wide enough to encompass compensatory relief against directors and third parties in an appropriate case; and

(b) what is an appropriate case depends on the facts and circumstances of that particular case guided by the legal test enunciated in para 128 of this judgement.

OUR ANSWER TO THE LEAVE QUESTIONS

[137] For the reasons we have set out above, we answer question 1 in the negative. questions 2 and 3 are answered in the affirmative. As for questions 2.1 and 3.1, suffice for us to say that it is ultimately dependent on the circumstances of a particular case. We concur with the appellant on the position in law as comprehensively and skilfully set out in Auspicious Journey's written submissions.

Application of the law to the instant appeal

[138] As the lower courts erred in their application of the relevant law relating to directors and third-party liability in an oppression claim under s 181 of the CA 1965, it remains for this court to apply the legal test enunciated in para 128 to the facts of the instant appeal. It is important to underscore that in so doing the findings of fact of the High Court as affirmed by the Court of Appeal remain untouched.

[139] The courts below have concurrently found that Hoe Leong's acts constituted oppressive conduct against Auspicious Journey and those findings

are not being appealed against in the present proceedings. What is in contention is whether the Kuah brothers in their capacity as directors of Ebony Ritz and the other two third parties ought to be made personally liable for the ir oppressive, detrimental and/or prejudicial conduct vis a vis the minority shareholder, Auspicious Journey.

[140] While s 181 of the CA 1965 (now s 346 of the CA 2016) permits the imposition of personal liability on directors and/or third parties, such imposition of liability must be fair and just in accordance with the facts and circumstances of the case. The legal test outlined in para 128 is applicable to ascertain whether liability in the instant appeal ought to be extended to the Kuah brothers.

[141] In applying the test as set out in para 128 above, the following facts are relevant:

(a) the High Court judge made clear findings of oppression on the part of the majority shareholder through the acts of the directors of Ebony Ritz namely the Kuah brothers. These acts as set out in the originating summons included the following;

(b) the expropriation of Ebony Ritz's 2% call option which caused loss to Ebony Ritz. This amounted to oppressive conduct on the part of Hoe Leong, the majority shareholder, as well as the directors of Ebony Ritz, the Kuah brothers, as Andy Kuek was unaware of such expropriation until much later;

(c) the expropriatio n of the minority shareholder, Auspicious Journey's own 49% call option by the majority shareholder, Hoe Leong and its nominee, through the acts of the Kuah brothers in their capacity as directors of Ebony Ritz. This was prejudicial and caused injury and loss to Auspicious Journey;

(d) in order to achieve such expropriation, the majority shareholder, Hoe Leong and the Kuah brothers as directors of Ebony Ritz had wrongfully waived Ebony's Ritz's entitlements under the profit shortfall guarantee and Ebony Ritz's 2% call option;

(e) Hoe Leong and the Kuah brothers as directors of Ebony Ritz had caused the latter to furnish an indemnity to keep Sumatec indemnified in the event any claims were made against Sumatec. There was also a reassignment of dividends previously payable to Ebony Ritz such that all previous conditions were waived, without the minority shareholder's knowledge or consent. This caused detriment to Ebony Ritz and to Auspicious Journey as a minority shareholder as it had been wrongly kept out of the management of the company;

(f) as against this both the courts below recognised that what the Kuah brothers and Hoe Leong had effected was a salvage and warehousing arrangement, in the best interests of Ebony Ritz. The High Court judge put it this way: '63. It must be emphasized that based on the evidence addced by the parties, it was clear that the Directors breached the respective contracts in the best intere st of the company in its investment in Semua International'.

(g) the Court of Appeal similarly held: '... [39] What Geok Khim and Geok Lin did as found by the learned judge above was not in relation to Hoe Leong. Instead the decision of Hoe Leong through these nominated directors was in the best interest of Ebony Ritz ...'. The basis for this finding is the background factual matrix which disclosed that Auspicious Journey did not want to extend any further monies for the joint venture and even expressly refused to do so when it was sought. This is to be contrasted with the conduct of Hoe Leong in injecting no less than RM38m into Semua International in order to enable it to keep afloat. It is an unavoidable inference that Auspicious Journey did not wish to throw good money after bad, in the sense that it was not prepared to come up with the requisite funds to purchase either its share of the 2% call option available to Ebony Ritz, far less the 49% call option in its own favour. The latter particularly would have required a considerable capital investment which it refused to make. While it is contended by Auspicious Journey that these matters ex post facto, and do not detract from the oppressive conduct of the directors, the applicability of the 'fair and just' test, requires all these matters to be taken into consideration in determining whether or not liabi lity ought to be visited personally upon the directors;

(h) it follows from the foregoing that the acts of the majority shareholder and its nominated directors in Ebony Ritz were directed towards a salvage and warehousing situation as Auspicious Journey did not wish to expend further monies to effect such salvage of Ebony Ritz's investment. While the acts themselves and the manner in which they were carried out may be categorised as prejudicial and detrimental to the minority shareholder Auspicious Journey, it remains an inexorable reality that the conduct was ultimately related to salvaging Ebony Ritz. This weighs in favour of a non-attribution of liability as the court is bound to consider what is 'fair and just' in all the circumstances of the case; and

(i) taking into account therefore, the entirety of the circumstances as set out above, I am of the view that the High Court and the Court of Appeal concluded correctly that liability ought not be visited upon the directors or third parties.

[142] As such the preponderance of factors militates against holding the Kuah

brothers, and *a fortiori* Teh, personally liable for their oppressive conduct.

Remedies – Should a buy-out have been ordered rather than winding up?

[143] One final issue remains to be dealt with. Auspicious Journey has, at all times, sought a buy-out order and strongly opposed relief in the form of a winding up order. However, b oth the High Court and Court of Appeal refused to grant the buy-out order sought by Auspicious Journey in its originating summons. In this appeal too, Auspicious Journey sought to revisit this issue, maintaining that both the courts below had erred in ordering a winding up of Ebony Ritz instead. It is to be noted that no leave was granted on this issue. Notwithstanding this, substantive submissions were made by both parties on this issue during the hearing of the appeal. For that reason, we now set out and consider this aspect of the appeal.

[144] Auspicious Journey submits that the winding up order granted by the High Court did not remedy the matters complained of as:

(a) Hoe Leong was able to leverage on its majority shareholder status to vote in favour of the proposed appointment of its nominated private liquidator during a contributories' meeting, an application that has since been stayed pending disposal of the present appeal; and

(b) it does not deal with Ebony Ritz's losses including the expropriation of the Ebony Ritz 2% call option, the indemnity given by Ebony Ritz, the unlawful relinquishment of the RM27m profit shortfall guarantee and the obligation as regards payment of dividends.

[145] Auspicious Journey therefore contends that a buy-out order was and remains the most suitable relief to be awarded to it for the following reasons:

(a) although the relationship between Hoe Leong and Auspicious Journey has broken down, this does not mean that Ebony Ritz is a failed investment or business as it remained a going concern;

(b) even if Ebony Ritz is a failure, this is the direct result of the oppressive conduct and actions of the Kuah brothers and their nominee third parties;

(c) the court ought to disregard the fact that the *MSO* requires any company involved in the oil tanker industry to be a majority-Malaysian company and if a buy-out were granted, Ebony Ritz would be unable to continue carrying out business. Auspicious Journey takes the position that Ebony Ritz is only an investment holding company and its asset, Semua International has subsidiaries to carry on business without infringing the provisions of the MSO. Alternatively, shares may be

placed in a warehousing arrangement or with 'Malaysian Friendly Parties'; and

(d) Auspicious Journey also contends that in the event Ebony Ritz is found to be in breach of the MSO and their licence (if any) is in danger of being revoked, Hoe Leong may submit in mitigation that they acted under court compulsion.

[146] The respondents submit that Auspicious Journey is not entitled to contest the winding up order made by the courts below because in granting their leave application, this court dismissed all the questions in relation to whether winding up was a remedy of last resort or what were legitimate considerations for the courts to refuse to grant Auspicious Journey the remedy of a buy-out. The respondents argue that this is an attempt to reintroduce the buy-out issue via the backdoor. They maintain that both the courts below were correct in concluding that winding up was the most appropriate remedy on the factual matrix of this appeal.

[147] In opposing the buy-out sought by Auspicious Journey, the respondents submit that the courts below were correct in holding that it was not a suitable remedy because:

(a) Auspicious Journey would be unjustly enriched by a buy-out and be permitted to divest itself of a bad bargain;

(b) Semua International had difficulties sustaining its cash flow and the Semua Group had faced financial problems since 2011. In 2012, the Semua Group's total liability was RM472m;

(c) Hoe Leong injected RM50m into Semua International while Auspicious Journey did not make any corresponding contributions. Instead, its director Kuek Kian Joo took proceedings against Semua International through his company Grand Columbia Holdings Sdn Bhd; and

(d) Ebony Ritz was wound up on 3 August 2016 and has had no business activities since.

OUR DECISION

[148] The position in law in this jurisdiction is clear and much the same as other common law jurisdictions such as Singapore and the United Kingdom. Section 181(2) of the CA 1965 (now s 346(2) of the CA 2016 stipulates that the court 'may make such order as the Court thinks fit with the view to bringing an end or remedying the matters complained of'. The court is not restricted to the reliefs mentioned in s 181(2) (now s 346(2)) but is empowered to grant an open-ended range of remedies: *Kejutan*. This discretion includes

the discretion to refuse reliefs which the court feels inappropriate on the facts of the case: *Loh Siew Cheang, Corporate Powers Accountability* (3rd Ed, Malaysia, LexisNexis, 2018) at 637, citing *Antoniades v Wong & Ors* [1997] 2 BCLC 419 *at p 427* and *Re Jayflex Construction Ltd* [2004] 2 BCLC 145 at p 161. This court recognised in *Koh Jui Hiong v Ki Tak Sang* that an order of a compensatory nature could be made in a petition under s 346 of the Act if the order was made with the view to bringing an end to, or to remedy, matters rightly complained of under s 346.

[149] It is true that winding up is considered an 'extreme' and 'drastic' remedy for oppression, per Lord Wilberforce in the cases of *Cumberland Holdings Ltd v Washington H Soul Pattinson & Co Ltd* (1977) 2 ACLR 307 at p 312 and *Re Kong Thai at 233*, respectively. The Court of Appeal in Singapore in *Kuah Kok Kim v Chong Lee Leong Co (Pte) Ltd* [1991] 1 SLR(R) 795 at para [7] held that the court has an unfettered discretion which ought not to be limited or restricted by a general rule.

[150] It is clear that the remedial discretion under s 181(2) (now 346(2)), given its wide wording, would depend on the circumstances of the case. Thus, although there may be other remedies available, the court may consider winding up to be more appropriate. However, in considering whether to grant such a remedy, the court would bear in mind the 'drastic' character of winding up.

[151] A court determining an oppression claim is not bound by the reliefs the petitioner prefers or insists on, but is at liberty to fashion the remedy in accordance with the factual matrix of the case see (*Low Peng Boon v Low Janie* [1999] 1 SLR 337, *Re Gee Hoe Chan Trading Co Pte Ltd* [1991] 3 MLJ 137 and *Lim Swee Khiang v Borden Co (Pte) Ltd* [2006] 4 SLR(R) 745). The remedy granted would depend on the complaint and the circumstances prevailing at the time of the hearing, not at the start of the proceedings; see ; *Re Via Servis Ltd Skala v Via Sevis Ltd and another* [2014] All ER (D) 180 (Sep), *at [80]* and *Re Hailey Group Ltd* [1993] BCLC 459 at 473.

[152] The courts have ordered a winding up where there is a deadlock between the parties such that the business cannot effectively continue. This signifies a breakdown in the relationship between the parties which is the case here. Coupled with the potential statutory contravention and Ebony Ritz's insolvent state, winding up is justified.

[153] In asking for a buy-out of its shareholding in Ebony Ritz, it appears that Auspicious Journey is seeking, in effect, to escape from a bad bargain, or to recoup its investment in the joint-venture with Hoe Leong. The risk factor ancillary to an investment cannot be ignored. There is always a risk that an

investment may not pan out in the way it was intended. In our view, ordering a share buy-out would be tantamount to insulating Auspicious Journey from the risk that their capital was subject to. This is certainly not what s 346 was meant to protect against.

[154] Of considerable significance is the fact that this court cannot and will not unnecessarily interfere with the exercise of judicial power by the trial court, which was affirmed by the Court of Appeal. In this context it is relevant that the High Court determined that winding up was the most appropriate relief for sound reasons. The trial judge considered that a buy-out would mean that Ebony Ritz could not carry on its business of the chartering of oil tankers as it would be in breach of the MSO. The MSO requires any company involved in the oil tanker industry to be a majority Malaysian company. It could not be said that Semua International was in compliance with the MSO if Ebony Ritz was a wholly owned Singaporean entity. This went to the substratum of the basis on which Ebony Ritz was incorporated.

[155] Secondly, the trial judge reasoned that as Ebony Ritz was a failed joint-venture and insolvent, a buy-out would not yield a fair price. There was also considerable disagreement on valuation, both in terms of the basis and the valuer, which was an ancillary consideration as to why the court refused a buy-out.

[156] The Court of Appeal considered this issue of the appropriate remedy comprehensively. The position in law in relation to s 181(2) of the CA 1965 (now s 376(2) of the CA 2016) was considered in detail and I do not propose to repeat the detailed analysis made there. Suffice to say that it is, with respect, entirely reflective of the correct position in law (see the Singapore decision of *Kumagai Gumi Co Ltd v Zenecon Pte Ltd* [1995] 2 SLR(R) 304 at para [71] cited by this court in *Koh Jui Hiong v Ki Tak Sang*).

[157] Having considered the law exhaustively, the Court of Appeal agreed with the reasoning of the trial judge that on a consideration of the totality of the facts the remedy of a buy-out was not the most appropriate remedy. The trial judge had not erred in the exercise of her discretion in determining that winding up was the correct remedy.

[158] It is clear that both the trial judge and the Court of Appeal were, with respect correct in their exposition of the law as well as their analysis of the most appropriate remedy for oppression. Even though a buy-out may well be the most practical and efficacious solution in many cases of oppression, this does not mean that winding up is effectively precluded or the remedy of the very last resort. The somewhat unique facts of the instant appeal, namely the need for compliance with the MSO, the fact that Ebony Ritz is insolvent and the clear

breakdown in the relationship of the parties are key indicia that have to be taken into consideration. Both courts below undertook a compendious consideration of these factors before concluding on the appropriate remedy. It cannot be said that the trial judge or the Court of Appeal erred in their consideration of the relevant factors nor of their conclusion. It cannot also be said that the exercise of their powers to award the remedy of winding up was perverse. In the circumstances, we do not propose to interfere with the exercise of judicial powers of the trial judge under s 181(2) of the CA 1965.

LOSS

[159] One other point remains to be made. The reflective loss principle dictates that a personal claim may only be brought by a member against the directors of a company where he can demonstrate: (1) a breach of duty owed to him personally; and (2) personal loss separate and distinct from that suffered by the company. Thus, no act ion lies at the suit of a member suing in that capacity to make good a diminution in the value of his shareholding, where it is merely a reflection of the loss suffered by the company: *Johnson v Gore-Wood & Co* [2002] 2 AC 1, HL at p 35, *Koh Jui Hiong v Ki Tak Sang*, *Mak Siew Wei v Yeoh Eng Kong and other appeals* [2020] 1 MLJ 258; [2019] 7 CLJ 470.

[160] In the present appeal, many of the losses claimed by Auspicious Journey did not have a direct and personal impact on it in its capacity as minority shareholder of Ebony Ritz. In fact, in most instances, the losses claimed are, in actuality, losses suffered by Ebony Ritz. While the fact of the occurrence of the events giving rise to the losses are relevant for the purposes of establishing oppression, detriment or prejudice, this does not translate into actual loss suffered by Auspicious Journey. In assessing damages in relation to Auspicious Journey's loss, this issue has to be borne in mind.

CONCLUSION

[161] In summary, on the primary legal issue before this court, namely whether liability can devolve upon directors and third parties in an oppression action under s 181 of the CA 1965 (now s 346 of the CA 2016) we concur with the appellant that such liability can, in an appropriate case, be imposed on directors and third parties. However on the facts of the instant appeal, for the reasons we have stated, liability is not visited on the directors, the Kuah brothers.

[162] To that extent, both the trial court and the Court of Appeal erred in law in concluding that no such liability could be imposed under the statutory oppression regime as provided under the previous CA 1965 and the present CA

2016. However, it was concluded that this was not a just and fit case on its specific factual matrix to justify the extension of liability to the directors or third parties.

[163] We also concluded that the courts below did not err in awarding the remedy of winding up, rather than a buy-out in favour of Auspicious Journey, on the factual matrix of this appeal. Therefore, the appeal is dismissed. It is ordered that the matter be remitted to the High Court for damages to be assessed by the High Court judge in favour of Auspicious Journey.

[164] My learned sister and brother judges have read this judgment in draft and concur with the same. No order as to costs.

Appeal dismissed unanimously.

Reported by Ashok Kumar